TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 403.

JOHN PARROTT, PLAINTIFF IN ERROR,

vs.

D. N. BARNEY, THOMAS M. JANES, LOUIS McLANE, HENRY WELLS, WILLIAM G. FARGO, AND JAMES McKAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED NOVEMBER 21, 1871.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John Parrott and D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay, a manifest error hath happened, to the great damage of the said John Parrott, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this first Monday of December, A. D. 1870, and of the independence of the United States the ninety-fifth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Cir. Ct., &c.

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge.

b The answer of the judges of the circuit court of the United States of America for the district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court, &c., Ninth Cir. Dist. Cal.

(Indorsed:) 335. United States. In Supreme Court. John Parrott vs. D. N. Barney et al. Writ of error. Filed April 26, 1871. L. S. B. Sawyer, clerk, by J. F. O'Beirne, D. C.

c UNITED STATES OF AMERICA, *ss:*

To D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the first Monday of December, A. D. 1871, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein John Parrott is plaintiff in error, and you are de-

fendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 26th day of April, A. D. 1871, and of the independence of the United States the ninety-fifth.

[SEAL.] LORENZO SAWYER,
Judge of the Circuit Court of the United States for the District of California.

d (Indorsed:) 335. United States. In Supreme Court. John Parrott vs. D. N. Barney et al. Citation. Doyle & Barber, att'ys for pl'ff in error.

Personal service of a copy of the within citation is admitted this 1st day of May, 1871.

S. M. WILSON,
Att'y for Defendants in Error.

Filed 1st May, 1871.

L. S. B. SAWYER, *Clerk.*

1 In the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco.

JOHN PARROTT, PLAINTIFF,
vs.
D. N. BARNEY ET AL., DEFENDANTS.

Action brought in the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco in the office of the clerk of said district court.

Summons.

The people of the State of California send greeting to D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after service on you of this summons, if served within this county; or, if served out of this county but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to recover of you the damages sustained by the plaintiff by reason of the waste in the first count or cause
2 of action in said complaint set forth, amounting to sixty thousand dollars, and also for the other damages by him sustained by reason of the other matters in said complaint set forth, amounting, in all, to one hundred thousand dollars, besides costs.

And you are hereby notified that, if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the courts for the relief demanded therein.

Given under my hand and the seal of the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco, this 20th day of March, in the year of our Lord one thousand eight hundred and sixty-seven.

[SEAL.] W'M LOEWY, *Clerk.*
By OCTAVIUS BELL, *Deputy Clerk.*

(Endorsed:) Summons. Filed this 4th day of October, A. D. 1867. W'm Loewy, clerk, by Octavius Bell, deputy clerk.

3 *Complaint.*

District court of the twelfth judicial district in and for the city and county of San Francisco.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS N. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of "Wells, Fargo & Co."

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

John Parrott, plaintiff, by Doyle and Barber, his attorneys, complains of D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, Wil-G. Fargo, and James McKay, defendants, and for cause of action states as follows:

I. That, at the several times and at the place hereinafter mentioned, the said defendants were copartners, trading and doing business under the firm name of "Wells, Fargo & Co."

That he, the said plaintiff, at the time of the committing of the grievances hereinafter next mentioned, to wit, on the 16th of April, 1866, and long before that time, and continually thenceforth, hitherto, has been and still is seized in his demesne as of fee of a certain lot or parcel of land, situate, lying, and being in the city and county aforesaid at the northwesterly cor-
4 ner of Montgomery street and California street, in the said city and county, and bounded and described as follows, to wit: Beginning at the corner formed by the intersection of the northerly line of California street with the westerly line of Montgomery street, and running thence westerly along the northerly side of California street, one hundred and thirty-seven and a half feet; thence northerly and parallel to Montgomery street one hundred and thirty-seven feet six inches; thence easterly and parallel to California street, sixty-one feet six inches; thence southerly and parallel to Montgomery street seventy-one feet eight inches; thence easterly and parallel to California street seventy-six feet to the westerly side of Montgomery street, and thence southerly along the westerly side of Montgomery street sixty-five feet ten inches to the place of beginning; together with the buildings thereon erected, and being, to wit, a certain building of brick, with granite front, on California and Montgomery streets, called a granite building, and fronting sixty-five feet ten inches on Montgomery street aforesaid, and seventy-seven and one half feet on California street aforesaid; a certain piazza or portico, subdivided into rooms and offices, to the westward of the said last-mentioned building, fronting twenty feet on California street and extending back northwardly therefrom one hundred and seven and one half feet; a certain covered gateway of brick, lying to the

5 westward of the piazza or portico last mentioned, and fronting twenty feet on California street, and extending back northwardly therefrom thirty feet; a certain iron building lying to the westward of said gateway, having a front of twenty-five feet on California street, and extending back northwardly therefrom forty-seven and one-half feet; a certain brick building called a furnace, immediately northwardly of the said iron building and covering a rectangular parallelogram extending along the westerly side of the said lot of land twenty feet, and along the northerly side of said iron building fifteen feet; a certain other brick building immediately northward of that last mentioned, and covering a rectangular parallelogram extending along the westerly side of said lot of ground forty feet, and along the northerly side of said brick building called a furnace, fifteen feet; a brick building called a warehouce, immediately northward of the said last-mentioned brick building and of the piazza or portico aforesaid, and covering a rectangular parallelogram sixty feet long and thirty feet wide, extending along the most northerly line of the said lot of ground; a bridge connecting parts of said buildings; and ten water-closets with water-pipes and appurtenances.

And the said defendants, trading and doing business as aforesaid, were then and there the possessors and occupiers of portion of
6 the said premises, to wit, of the basement and first floor of the said building first-above mentioned, and called a granite building, together with certain vaults and banking fixtures therein contained, and the said brick warehouse, thirty by sixty feet, lastly above mentioned, together with the right of way and free passage thereto through the back yard of the said premises, and all appurtenances thereunto belonging, (including, among said appurtenances, the said water-closets, the said covered gateway, and the first story of the said brick building forty feet long by fifteen feet wide, lying next north of the building called a furnace, and hereinbefore described,) and during all the said time held the same of the said plaintiff as his tenants thereof, from year to year, at and under a certain yearly rent, to wit, the yearly rent of twelve thousand dollars, payable by the said defendants to the said plaintiff for the same, the reversion thereof all the said time remaining in him the said plaintiff. And the said defendants, whilst they so occupied and possessed the same as such tenants as aforesaid, to wit, on the 16th day of April, 1866, by themselves and their servants, carelessly, negligently, improperly, improvidently introduced and caused and procured to be introduced, and suffered and permitted to be introduced into the said portion of the said premises so occupied by
7 them as aforesaid, certain explosive substance and substances, and then and there, by themselves and their servants, so carelessly, negligently, improperly, and improvidently conducted themselves in and about the managing, keeping, examining, opening, handling, moving, striking, and percussing of the said substance and substances, and the containers thereof; that the same then and there exploded with great force and violence; and then and there, by means and force of the said explosion, broke down, wasted, and destroyed divers, to wit, twenty thousand square feet of brick walls, being the walls of the said brick buildings and covered gateway hereinbefore described; ten thousand yards of plaster, one hundred windows, two hundred window sashes, one hundred window frames, one hundred window casings, two thousand squares of glass, two thousand square feet of sashes, fifty door-frames, fifty door-cases, two thousand square yards of ceiling, two thousand feet of gas-pipes, two thousand feet of water-pipe, two

thousand square yards of wainscoting, five thousand square feet of floors, five chimneys, five water-closets, five hundred square yards of roof, one thousand floor-beams, one thousand roof-beams, one thousand rafters, ten thousand roof-boards, the whole of the said piazza or portico and the rooms therein contained, five vaults and the whole of the said banking fixtures: All being parcel of the freehold of the
8 said premises so held by them the said defendants as such tenants as aforesaid, of great value to wit, of the value of twenty thousand dollars; and thereby greatly weakened, damaged, spoiled, ruined, and wasted the said premises so held by them of the said plaintiff as aforesaid, to the waste, destruction, and injury of the aforesaid reversionary estate of the plaintiff therein, whereby the said plaintiff was and is greatly damaged and injured of and in his aforesaid estate of inheritance, of and in his aforesaid buildings, houses, and land, with the appurtenances and his said reversionary estate therein, against the form of the statute in such case made and provided, and to the damage of the said plaintiff of twenty thousand dollars.

II. And for a further and separate cause of action the plaintiff shows, that he, the said plaintiff, at the time of the committing of the grievances hereinafter next mentioned, to wit, on the 16th day of April, 1866, and long before that time was, and continually thenceforth hitherto has been and still is seized in his demesne as of fee of the lot or parcel of land situate, lying, and being in the city and county aforesaid, and hereinbefore, in the first count of this complaint, described, together with the buildings thereon erected, and being the same in the first count of this complaint described, and that one Gerrit W. Bell, was then
9 and there the possessor and occupier of portion of the said buildings and premises, to wit, of the first or lower floor of the said iron building and of that of the said brick building, situate to the northward thereof, and called a furnace, and that a certain corporation, called the Union Club of San Francisco, were then and there the possessors and occupiers of other portions of the said premises, to wit, of the whole thereof above the first or lower floor of all the said buildings and premises.

And during all the said time the said Gerrit W. Bell and the said Union Club of San Francisco, held the same respectively of the said plaintiff as his tenants of the several parts thereof so possessed and occupied by them respectively from month to month; the reversion thereof, all the said time, remaining in him, the said plaintiff.

And the said defendants, whilst the said last-mentioned premises were so occupied and possessed by the said Gerrit W. Bell and by the said Union Club of San Francisco, as such tenants of the said plaintiff as aforesaid, (they the said defendants, trading and doing business as in the first count hereinabove alleged, then and there occupying premises in the immediate vicinity thereof, to wit, the premises hereinbefore in the first count of the complaint alleged to have been possessed and occupied by them,) afterwards, to wit, on the 16th day of April, 1866, at the place aforesaid, then and there by themselves and their servants, carelessly, negligently, and improvidently introduced and caused
10 and procured to be introduced, and suffered and permitted to be introduced on, into, and upon, the said adjoining premises so occupied by them as aforesaid, certain explosive substance and substances, and then and there, by themselves and their servants, so carelessly, negligently, unskillfully, improperly, and improvidently conducted themselves in and about the managing, keeping, opening, examining, handling, moving, striking, and percussing of the said substance and sub-

stances, and the containers thereof, that the same then and there exploded with great force and violence, and then and there by means and force of the said explosion, broke down, wasted, and destroyed divers, to wit, two thousand square feet of iron walls, five thousand square feet of plaster, five hundred windows, five hundred window-frames, five hundred window-casings, one thousand window-sashes, two hundred doors, two hundred door-frames, two hundred door-casings, five thousand square yards of floors, five thousand square yards of roof, five thousand square yards of brick wall, five thousand floor-beams, five thousand roof-beams, five thousand rafters, thirty sky-lights, five water-closets, two thousand feet of water-pipe, two thousand feet of gas-pipe, two thousand squares of glass, two thousand window-sashes, two thousand other sashes, five thousand square yards wainscoting, twenty chimneys,
11 forty mantel-pieces, four dining-rooms, two kitchens, two laundries, three offices, two billiard-rooms, four parlors, two reading-rooms, forty chambers, forty other rooms, forty pantries, forty closets, six pairs of stairs, ten halls, ten passages, one bridge, three cooking-ranges, three boilers, three furnaces, ten thousand solid feet of brick-work; all then and there being parcel of the freehold of the said premises, so possessed and held by the said Gerrit W. Bell and the said Union Club of San Francisco, respectively, as such tenants of the said plaintiff respectively, of great value, to wit, of the value of thirty thousand dollars, and thereby greatly weakened, damaged, spoiled, ruined, and wasted the said premises so held by the said Gerrit W. Bell, and the said Union Club of San Francisco, respectively, of the said plaintiff as aforesaid, whereby the same were rendered untenantable for a long space of time, to wit, for the space of six months next thereafter, in consequence whereof the same were surrendered and abandoned by the said tenants of the said plaintiff; and the plaintiff was, by reason of their said injured, ruined, and wasted condition, unable to rent the same out, or to obtain any rent or hire for the same, as he otherwise could and would have done, to wit, for the aforesaid space of six months next ensuing the said explosion; by all which premises in this count mentioned the said plaintiff was greatly injured and damaged in
12 his aforesaid reversionary estate of inheritance, in the said premises so occupied and possessed by the said Gerrit W. Bell and the said Union Club of San Francisco, in this count described, and lost the rents, profits, and gains he would otherwise have received from the said premises, amounting to six thousand dollars.

To the damage of the said plaintiff of thirty thousand dollars.

III. And for a further and separate cause of action the said plaintiff further shows that the said defendants, before and at the time of the committing of the grievances hereinafter next mentioned, to wit, on the 16th day of April, 1866, were lawfully in possession of a portion of the following described premises, namely: All that certain lot of land on the northwestern corner of California and Montgomery streets, in the city of San Francisco, with its front on the west side of Montgomery street, extending thereon sixty-five feet ten inches northwardly from the said corner of California street, and its southerly side extending along the north side of California street one hundred and thirty-seven feet six inches westwardly from Montgomery street; the most westwardly sixty-one feet six inches of said lot having a depth from California street, northwardly, of one hundred and thirty-seven feet and six inches, together with a granite building, three brick buildings, one iron building, and various other structures, erections and fixtures thereon. And that said defndants were so in possession of said portion of said

13 premises, and held and occupied the same as tenants thereof to the plaintiff, to whom the immediate reversion thereof belonged, under a certain demise thereof theretofore made to the defendants, at and under a certain rent therefor, payable by the defendants to the plaintiff, and that a certain other portion of said premises was in the possession and occupation of one Gerrit W. Bell, who held the same as tenant of the plaintiff; and a certain other portion of said premises was in the possession and occupation of a certain corporation known as the Union Club of San Francisco, which held the same as tenant of the plaintiff, to whom the immediate reversion, reversionary estate and interest of, in, and to said last-mentioned portions of said premises, and of the entire premises above in this count described, likewise then and ever since belonged.

That the defendants, whilst the said first-mentioned portion of said premises was so in their possession and occupation, as tenants thereof to the plaintiff, and whilst the immediate reversion, reversionary estate, and interest of, in, and to the whole of the said premises belonged to the plaintiff, did, by themselves and their servants, negligently and carelessly, and without proper precaution, bring and introduce, and cause' and procured to be brought and introduced, and suffer and permit to be brought and introduced into and upon and within the said portion of said premises, which was so in their possession and occupation

14 as last aforesaid, a certain box or package, containing some highly dangerous explosive substance, compound, or preparation, the composition of which is to the plaintiff unknown, and whilst the said box or package, so containing the said highly dangerous explosive substance, compound, or preparation aforesaid, was within and upon the last-mentioned portion of said premises, and in the charge and custody, and under the control of the defendants, the said defendents, by themselves and their servants, so negligently and carelessly conducted themselves in respect to said box or package and the aforesaid substance, compound, or preparation therein contained, and so carelessly and negligently treated the same, and took so little and such bad care thereof, and so little precaution to prevent injury therefrom, that the said substance, compound, or preparation, exploded with great violence, and threw down, destroyed, damaged and defaced various portions of the walls, roofs, floors, partitions, ceilings, stairs, doors, windows, wainscoting, sky-lights, water-closets, pipes, and other parts of the last-mentioned portion of said premises; and also of the aforesaid other portions of said premises, of which the said Union Club of San Francisco and the said Gerrit W. Bell were severally in possession as aforesaid.

That, by reason of such throwing down, destruction and damage of and to said premises as aforesaid, the plaintiff was greatly dam-

15 aged and injured in his reversion, reversionary estate, and interest in and to said premises, and the said portions of said premises of which the said Gerrit W. Bell and the said Union Club were severally and respectively in possession as aforesaid, were thereby rendered untenantable and unfit for and incapable of occupation, and were in consequence thereof, vacated and surrendered, and abandoned to the plaintiff, and so remained and continued for the period of six months or thereabouts, which period was necessarily occupied and consumed in repairing the same, and replacing them in a tenantable condition, and by reason of such surrender and abandonment, the plaintiff lost and was deprived of the rent of the said last-mentioned portions of said premises, which would otherwise have accrued to him, and been received by him from the said Union Club and the said Gerrit W. Bell

respectively, amounting to six thousand dollars in gold coin of the United States.

Wherefore, and by reason of the premises in this count mentioned, the said plaintiff sustained damages to the amount of fifty thousand dollars.

And the plaintiff therefore asks judgment against the said defendants for treble the damages sustained by him, by reason of the waste in the first count or cause of action hereinabove set forth, amounting to sixty thousand dollars; and, also for the other damages by him, sus-
16 tained by reason of the other matters hereinabove set forth, amounting in all, to one hundred thousand dollars besides costs.

San Francisco, March 18, 1867.

DOYLE AND BARBER,
Atty's for Pl'ff's.

(Endorsed:) Filed March 20, 1877, W'm Loewy, cl'k, by Octavius Bell, D. C.

17 *Affidavit of John Parrott.*

Twelfth district court, city and county of San Francisco.

JOHN PARROTT
v.
D. H. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo, & Co.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

JOHN PARROT, being duly sworn, says that he is the plaintiff in this action, and that the same is brought to recover damages for the waste and injury hereinafter mentioned. That the complaint herein was filed in this court, on the 20 day of March, A. D. 1867, and a summons duly issued thereon on the same day, but that said summons has not been served on said defendants, or any of them, because of the absence from this State of each and all of the said defendants.

Deponent further says that, on and prior to the 16th day of April, 1866, the said defendants, who were then doing business in this State as copartners, under the copartnership name of Wells, Fargo, & Co., occupied as tenants of the plaintiff certain portions of the lot of
18 ground, with buildings thereon, at the northwesterly corner of Montgomery and California streets, in the city of San Francisco; and other persons were at the same time in the occupation of other portions of said lot of land and buildings thereon, as tenants of him the said plaintiff; the reversion in fee of the whole of said premises being then and ever since and still in him the said plaintiff. That the said defendants, on or about the said 16th of April, 1866, carelessly introduced into the portion of said premises so occupied by them as aforesaid, some highly explosive substance, and so carelessly handled and managed the same that it exploded and knocked down and broke and ruined parts of the walls, partitions, floors, ceiling, windows, and doors, of the said premises, to the waste and destruction of the reversionary estate of the plaintiff therein, causing damage thereto of several thousand dollars, and rendering parts of the same untenantable, and causing the plaintiff to lose the rent thereof for several months, which he otherwise would have obtained.

And deponent further says that all of the defendants in this action reside out of the State of California, to wit, in the State of New York; that the place of residence of the said Henry Wells, D. N. Barney, James McKay, Thomas M. Janes, and Louis McLane, is, according to deponent's best information, and as he verily believes, the city of New York, and that of the defendant William G. Fargo, is either in
19 said New York, or in Buffalo, in the State of New York—deponent cannot satisfactorily ascertain which. That at the time deponent demised the premises above-mentioned to the said Wells, Fargo & Co., he received from them a note stating the residences of the said Henry Wells, D. N. Barney, James McKay, and T. M. Janes, to be in the city of New York, and that of the said William G. Fargo to be at Buffalo, N. Y. That the said firm of Wells, Fargo & Co., has recently—as publicly reported and announced in the news columns, and by advertisements in the newspapers—sold out and transferred its business to a corporate body trading under the same name of Wells, Fargo & Co., carrying on the same general business which the said firm formerly did, composed largely of the same individuals, retaining the same offices, and in the main the same agents and persons employed. That in order to ascertain whether any change had taken place in the residence of the said defendants, or any of them, he applied a few days since at the office of said Wells, Fargo , in this city, for information as to their residence, and was informed by A. B. Forbes, esq., who is the San Francisco manager of the express department of the present company of Wells, Fargo & Co., (down to the time of the said incorporation, had occupied the same position in the said firm of Wells, Fargo & Co.,) that the defendants D. H. Barney, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, all reside in the said
20 city of New York, but that the residence of the defendant Henry Wells was, to him, said Forbes, unknown. That the deponent has enquired, and caused enquiries to be made, as to the residence of said defendant Wells, of many persons, among others of Charles McLane, head of the San Francisco banking department of the present company of Wells, Fargo & Co., and brother of the defendant Louis McLane, and of W. F. Babcock, esq., who, until lately, had intimate business relations with said firm of Wells, Fargo & Co., in San Francisco, but deponent has been unable to obtain any further information as to the residence of said last-named defendant, except what is stated above. And that deponent wells knows the defendant Louis McLane, and knows that he left this State about September last for the purpose of taking charge of the business of said corporation of Wells, Fargo & Co., in New York, and that he has not, since that time, returned to this State; deponent, in the course of thirty days after his said departure hence, learned, from several of the intimate friends of said Louis McLane, that *telegraphs* [telegrams] had been received here from him announcing his safe arrival in New York, and shortly afterwards that he had been duly elected president of said corporation of Wells, Fargo & Co., and taken charge of its business in New York City, and an advertisement appears in the daily newspapers of this city announcing the same fact.

21 Deponent further says that, in the New York City directory for the current year, (viz, from May 1st, 1866, to May 1st, 1867,) the names of D. N. Barney, Henry Wells, Thomas M. Janes, and William G. Fargo, are all given as having their places of business in the city of New York, and deponent believes the persons so named in said

directory to be the same persons of those names, respectively, who are defendants in this action.

JOHN PARROTT.

Sworn and subscribed before me this 13th day of April, 1867.

O. C. PRATT,
Judge 12th Jud. Dist.

22 *Order of publication of summons.*

Twelfth district court, city and county of San Francisco.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co.

It appearing to my satisfaction, from the affidavit of John Parrott, the plaintiff herein, annexed hereto, that all the defendants in this action reside out of the State of California, and that the place of residence of all of said defendants is the city of New York, in the State of New York, and that a cause of action exists in this action against them, and each of them, in favor of the said plaintiff, and that the complaint in this action has been filed, and a summons duly issued thereon directed to said defendants. And, being satisfied that a publication of said summons in the "Daily Evening Bulletin," a newspaper published in the city and county of San Francisco, would be most likely to give notice to said defend-

23 ants, now, on motion of Doyle & Barber, attorneys for the said plaintiff, I do hereby order that the said summons in said action be served on all the said defendants herein by the publication of said summons; that the said publication be made in the said "Daily Evening Bulletin," once in each week for three successive months. And I do further order that six separate copies of the summons and complaint herein be forthwith deposited in the post-office of San Francisco, directed severally to each of said defendants, respectively, at the city of New York, State of New York, the place of residence of each of said defendants, and that the postage be paid thereon.

Dated San Francisco, April 13th, 1867.

O. C. PRATT,
Judge 12th Jud. Dist.

(Endorsed:) Filed June 28th, 1867. W'm Loewy, cl'k, by Octavius Bell, D. C.

24 *Affidavit of publication of summons.*

12th district court, San Francisco.

JOHN PARROTT
v.
D. N. BARNEY ET AL.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

A. C. BONNELL, of said city and county, a white male citizen of the United States, over the age of twenty-one years and competent to be a

witness on the trial of the above-entitled action, being duly sworn, says That, at the times hereinafter mentioned he was, and now is, a white male citizen of the United States, over the age of twenty-one years, and competent to be a witness on the trial of this action, and then was and now is the book-keeper and principal clerk of the printers and publishers of the newspaper known as the "Daily Evening Bulletin;" that said newspaper is, and since the 14th day of April, 1867, has been, published daily (Sundays and holidays excepted) in the said city and county of San Francisco; that deponent then had and now has charge of the advertisements inserted in said newspaper, and especially that he has had charge of the advertisement next hereinafter mentioned.

25 Deponent further says that the summons in the above-entitled action, a printed copy whereof is hereunto affixed, has been published in said newspaper once in each week for three months, namely, from the 15th day of April, A. D. 1867, to the 15th day of July, 1867, both days inclusive, and that the same was so published on the 15, 22, and 29th of April; on the 6, 13, 20, and 27th of May, on the 3rd, 10th, 17th, and 24th of June, and on the 1st, 8th, and 15th days of July, A. D. 1867.

A. C. BONNELL.

Subscribed and sworn to before me this 20 day of July, by the above-named affiant, who is personally known to me to be a white male citizen of the United States over the age of twenty-one years.

[SEAL.] HENRY S. TIBBEY,
Notary Public.

(Endorsed:) Filed Oct. 4, 1867. W'm Loewy, clerk, by Octavius Bell, D. C.

26 *Copy of printed copy of summons.*

In the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco.

JOHN PARROTT, PLAINTIFF,
vs.
D. N. BARNEY ET AL., DEFENDANTS.

Action brought in the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, and the complaint filed in said city and county of San Francisco, in the office of the clerk of the said district court.

The people of the State of California send greeting to D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county; or, if served out of this county, but in this district, within twenty days; otherwise within forty days—or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to recover of you the damages sustained

by the plaintiff by reason of the waste in the first count or cause of action in said complaint set forth, amounting to sixty thousand dol-
27 lars, and also for the other damages by him sustained by reason of the other matters in said complaint set forth, amounting in all to one hundred thousand dollars, besides costs.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded therein.

Given under my hand and the seal of the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, this 20th day of March, in the year of our Lord one thousand eight hundred and sixty-seven.

[Seal and U. S. int. rev. stamp; 50 cents, cancelled.]

W'M LOEWY, *Clerk.*
By OCTAVIUS BELL,
Deputy Clerk.

DOYLE AND BARBER, *Attorneys for Plaintiff.*

Ap. 15-1 aw, 3 M. M.

28 *Affidavit of John S. Bugbee.*

In the 12th dist. c't, city and county of San Francisco.

JOHN PARROTT
v.
D. N. BARNEY ET AL.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

JOHN S. BUGBEE, of said city and county, a white male citizen of the United States, over the age of twenty-one years, being duly sworn, says: That, in pursuance of an order made on the 13th day of April, 1867, by the judge of the 12th district court, in the above-entitled action, he, this deponent, on the said 13th day of April, deposited in the post-office at San Francisco, six separate copies of the complaint herein, & duly certified by the clerk of said court, and of the annexed summons; said copies of said complaint and summons being enclosed in envelopes, and directed severally to each of the defendants in this action, to wit: to D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, at the city of New York, State of New York, the postage having been first duly paid thereon, and on each thereof.

29 And deponent further says that he, this deponent, is, and at the time hereinbefore mentioned was, a white male citizen of the United States, over the age of twenty-one years, and competent to be a witness on the trial of the above-entitled action.

JOHN S. BUGBEE.

Subscribed and sworn to before me this 15th day of April, 1867.
[SEAL.] HENRY S. TIBBEY,
Notary Public.

(Endorsed:) Filed Oct. 4th, 1867. W'm Loewy, clerk, per Octavius Bell, D. C.

30 *Appearance of defendants.*

In the district court of the twelfth judicial district in and for the city and county of San Francisco.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co.

The said defendants, D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, in the above-entitled action, do hereby enter their appearance in this action.

E. CASSERLY,
Att'y for Defendants.

SAN FRANCISCO, *August 21st*, 1867.

(Endorsed:) Filed Aug. 21st, 1867. W'm Loewy, cl'k, by Octavius Bell, D. C.

31 *Petition for removal of cause to U. S. circuit court.*

In the district court of the twelfth judicial district in and for the city and county of San Francisco.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co.

To the district court of the twelfth judicial district in and for the city and county of San Francisco:

1. The petition of D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, the above-named defendants, shows that an action has been brought in this court against the petitioners, by John Parrott, the plaintiff above-named.

2. That this action is brought upon the following cause:

For alleged waste, injury and destruction in and upon and to certain lands and buildings thereon, and certain estate and interest of the
32 plaintiff in said lands and premises in said city and county of San Francisco, produced by the alleged wrongful acts of the defendants in introducing, or suffering to be introduced, in and upon said lands and premises, certain explosive substances, and in the handling thereof, causing the explosion of the same, to the damage of the said plaintiff, in one hundred thousand ($100,000) dollars, as is alleged.

3. That the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, as appears by the said complaint, wherein the damages of the plaintiff, by reason of the wrongs therein alleged, as in article 2 of this petition set forth, are alleged at one hundred thousand dollars, ($100,000.)

4. That the plaintiff is a citizen of the State of California, and your petitioners are, each and all, citizens and residents of the State of New York.

5. That your petitioners now do enter their appearance, in this action, but have not done so heretofore.

6. That they hereby offer good and sufficient surety for their entering in the next circuit court of the United States for the northern district of the State of California, on the first day of its session, copies of the process against them in this action; and also for their appearing and entering special bail in the action, if special bail were originally re-
33 quisite therein, according to the law and practice of the United States and its courts.

Your petitioners therefore ask that the said cause may be removed for trial into the next circuit court to be held in the district where the same is pending, to wit, into the next circuit court for the northern district of the State of California, pursuant to the provisions of the said statutes of the United States in such case made and provided, and that this court do accept the surety offered by your petitioners as aforesaid and do proceed no further in the said cause.

And for such other and further order or relief as may be just.

E. CASSERLY,
Att'y of Petitioners.

CITY AND COUNTY OF SAN FRANCISCO *ss:*

Charles E. McLane having been sworn, says: That he is a resident of the said city and county, and personally knows the petitioners in the foregoing petition mentioned, and, is their agent for the purpose of protecting their interests in the above-entitled action.

That he has read the foregoing petition, and knows the contents thereof, and the same is true of his own knowledge.

That this verification is not made by the said petitioners, or
34 any of them, for the reason that they, each and all of them, are now, and have been, ever since before the filing of the complaint in the above-entitled action, absent from the State of California.

CHARLES E. McLANE.

Subscribed and sworn to before me this 21st day of August, 1867.

[SEAL.] W'M WILLSON LAWTON,
Notary Public.

(Endorsed:) Filed Aug. 21st, 1867. W'm Loewy, cl'k, per Octavius Bell, D. C.

35 *Bond on removal of cause from State court.*

Know all men by these presents, that we, Charles E. McLane, of the city and county of San Francisco, and Milton S. Latham, of the said city and county, are hereby held and firmly bound unto John Parrott of said city and county, his executors, administrators and assigns in the sum of six thousand two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said John Parrott, his executors, administrators, or assigns; for which payment well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, and every of them forever, by these presents, sealed with our seals, this 21st day of August, in the year one thousand eight hundred and sixty-seven.

I. Whereas the above-named John Parrott has commenced an action in the district court of the twelfth judicial district in and for the city and county of San Francisco, State of California, against D. N. Barney, Henry

Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay.

II. And whereas the said D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay have
36 entered their appearance in such action in said court, and, at the same time have filed their petition for the removal of the cause into the next circuit court of the United States to be held in the district where the said action is pending, namely, into the next circuit court for the northern district of the State of California:

Now, therefore, the condition of the above obligation is such, that if the said D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, shall enter in said circuit court for the northern district of the State of California, on the first day of its session, copies of the process against them in said cause, and shall also then and there appear and enter special bail in the cause, if special bail was originally requisite therein, according to the law and practice of the United States and its courts, then these presents and obligations shall be void; otherwise to remain in full force.

CHA'S E. McLANE. [SEAL.]
MILTON S. LATHAM. [SEAL.]

Signed, sealed, and delivered in the presence of—

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

Charles E. McLane and Milton S. Latham above named, being severally duly sworn, say, each for himself, that he is a resident and householder of said city and county and is worth the sum specified in the
37 said undertaking, over and above all his debts and liabilities, and exclusive of property exempt from execution.

CHA'S E. McLANE,
MILTON S. LATHAM.

Subscribed and sworn to before me this 21st day of August, 1867.
[SEAL.] W'M WILLSON LAWTON,
Notary Public.

(Endorsed:) Filed Aug't 21, 1867. W'm Loewy, clerk, by Octavius Bell, D. C.

38 *Certified copy of order entered on minutes of 12th dist. court, continuing motion to remove cause to circuit court.*

In the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco. July term, August 25th, 1867.

Present, Hon. O. C. Pratt, judge.

JOHN PARROTT, PLAINTIFF,
v.
D. N. BARNEY & AL., DEFENDANTS.

Upon consent of counsel the application of the defendant to remove this cause to the circuit court for the northern district of California is continued until Saturday, Aug. 31st, 1867.

I hereby certify the foregoing to be a full, true, and correct copy of

an order entered on the minutes of said 12th district court in the above-entitled cause.

Attest my hand and the seal of said district court this 5th day of October, A. D. 1867.

[SEAL.]

W'M LOEWY, *Clerk.*
By OCTAVIUS BELL, *Deputy Clerk.*

39 *Certified copy of order from minutes of 12th district court, submitting motion to remove cause to U. S. circuit court.*

In the district court of the 12th judicial district of the State of California in and for the city and county of San Francisco. July term, August 29th, 1867.

Present, Hon. O. C. Pratt, judge.

JOHN PARROTT, PLAINTIFF,
v.
D. N. BARNEY ET AL., DEFENDANTS.

The application of the defendants to remove this cause to the circuit court for the northern district of the State of California was this day argued by J. T. Doyle, esq., for plaintiff, and Eugene Casserly, esq., for defendant, and submitted to the court for consideration, and decision upon briefs to be filed in 5 days.

I hereby certify the foregoing to be a full, true, and correct copy of an order entered on the minutes of said 12th district court in the above-entitled cause.

Attest my hand and the seal of said district court this 5th day of October, A. D. 1867.

[SEAL.]

W'M LOEWY, *Clerk.*
By OCTAVIUS BELL, *Deputy Clerk.*

40 *Certified copy of order of 12th dist. court, removing cause to U. S. circuit court.*

In the district court of the 12th judicial district in and for the city and county of San Francisco.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS N. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co.

A petition having been filed by the defendants above named in this action, at the time of entering their appearance therein, on the 21st day of August, 1867, praying for the removal thereof into the circuit court of the United States in and for the northern district of California, pursuant to the statutes of the United States in such case made and provided, and the said petitioners having offered good and sufficient surety, pursuant to the provisions of said statutes, and with such conditions in the bond by them offered as are by said statutes required, and an order to show cause why the prayer of the said petition should not be granted having been made on the 21st day of August, 1867:

41 Now, upon the hearing upon said order to show cause and of Messrs. Casserly and Barnes, of counsel for the said petitioners, and Messrs. Doyle and Barber, of counsel for the said plaintiff in opposition to the said petition, it is declared that it is made to appear, to the satisfaction of this court, that the said action above entitled has been commenced in this court by the plaintiff, who is a citizen of the State of California, against the said petitioners, who are the defendants in said action, and are each and all citizens of another State, namely, of the State of New York; and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs. And it is hereby further declared and ordered that this court accepts the said surety offered by the petitioners, and that the said action be remanded for trial into the next circuit court of the United States, to be held in the northern district of California, pursuant to the said statutes; and that this court do proceed no further in the cause herein, and that all proceedings in this court in the said cause be, and the same are hereby, stayed.

SAN FRANCISCO, *Sept. 21st*, 1867.

I hereby certify the foregoing to be a full, true, and correct copy of an order entered on the minutes of said 12th district court in the above-entitled cause.

Attest my hand and the seal of said district court this 5th day of October, A. D. 1867.

[SEAL.] W'M LOEWY, *Clerk.*
By OCTAVIUS BELL, *Deputy Clerk.*

42 *Certificate to transcript of record of 12th dist. court.*

In the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco.

JOHN PARROTT
v.
D. N. BARNEY & AL.

I, W'm Loewy, county clerk of the city and county of San Francisco, and ex-officio clerk of the district court of the twelfth judicial district of the State of California, in and for the city and county of San Francisco, do hereby certify the foregoing to be full, true, and correct copies of original papers on file in my office (and of the orders made and entered in the minutes of said court) in the above-entitled cause; that the same constitute a full and complete transcript of the record in the said cause and of the whole of such record.

In witness whereof I have hereunto set my hand and affixed the seal of said court, this 5th day of October, A. D. 1867.

[SEAL.] W'M LOEWY, *Clerk.*
By OCTAVIUS BELL, *Dep. Clk.*

43 (Endorsed:) Transcript of record from 12th jud. district. Filed Oct. 7, 1867. Geo. E. Whitney, cl'k, p'r J. O. Wheeler, dep.

sand dollars; and thereby greatly weakened damaged, spoiled, ruined, and wasted the said premises so held by them of the said plaintiff as aforesaid to the waste, destruction, and injury of the aforesaid reversionary estate of the plaintiff therein, whereby the said plaintiff was and is greatly damaged and injured of and in his aforesaid estate of inheritance, of and in his aforesaid buildings, houses, and land with the appurtenances, and his said reversionary estate therein, against the form of the statute in such case made and provided, and to the damage of the said plaintiff of twenty thousand dollars.

II. And for a further and separate cause of action the plaintiff shows that, he, the said plaintiff, at the time of the committing of the grievances hereinafter next mentioned, to wit, on the 16th day of April, 1866, and long before that time was, and, continually thenceforth, hitherto has been, and still is, seized in his demesne as of fee of the lot or parcel of land situate, lying, and being in the city and county aforesaid,
50 and hereinbefore in the first count of this complaint described, together with the buildings thereon erected, and being the same in the first count of this complaint described and that one Gerrit W. Bell was then and there the possessor and occupier of portion of the said buildings in said premises, to wit, of the first or lower floor of the said iron building and that of the said brick building situate to the northward thereof, and called a furnace, and that a certain corporation called the Union Club of San Francisco, were then and there the possessors and occupiers of other portions of the said premises, to wit, of the whole thereof above the first or lower floor of all the said buildings and premises. And during all the said time the said Gerrit W. Bell and the said Union Club of San Francisco, held the same, respectively, of the said plaintiff as his tenants of the several parts thereof so possessed and occupied by them respectively from month to month; the reversion thereof all the said time remaining in him, the said plaintiff.

And the said defendants, whilst the said last-mentioned premises were so occupied and possessed by the said Gerrit W. Bell, and by the said Union Club of San Francisco as such tenants of the said plaintiff as aforesaid, (they, the said defendants, trading and doing business as in the first count hereinabove alleged, then and there occupying premises in the immediate vicinity thereof, to wit, the premises hereinbefore in the first count of the complaint alleged to have been possessed and
51 occupied by them,) afterwards, to wit, on the 16th day of April, 1866, at the place aforesaid, then and there by themselves and their servants, carelessly, negligently, and improperly introduced, and caused and procured to be introduced, and suffered and permitted to be introduced, on, into, and upon, the said adjoining premises so occupied by them as aforesaid, certain explosive substance and substances, and then and there, by themselves and their servants, so carelessly, negligently, unskillfully, improperly, and improvidently, conducted themselves in and about the managing, keeping, opening, examining, handling, moving, striking, and percussing of the said substance and substances, and the containers thereof that the same then and there exploded with great force and violence, and then and there, by means and force of the said explosion, broke down, wasted, and destroyed divers, to wit, two thousand square feet of iron walls, five thousand square feet of plaster, five hundred windows, five hundred window-frames, five hundred window-casings, one thousand window-sashes, two hundred doors, two hundred door-frames, two hundred door-casings, five thousand square yards of floors, five thousand square yards of roof, five thousand square yards of brick wall, five thousand floor-beams, five thousand roof-beams, five thousand rafters, thirty

sky-lights, five water-closets, two thousand feet of water-pipe, two thou-
sand feet of gas-pipe, two thousand squares of glass, two thou-
52 sand window-sashes, two thousand other sashes, five thousand
square yards wainscoting, twenty chimneys, forty mantel pieces, four dining-rooms, two kitchens, two laundries, three offices, two billiard-rooms, four parlors, two reading-rooms, forty chambers, forty other rooms, forty pantries, forty closets, six pairs of stairs, ten halls, ten passages, one bridge, three cooking ranges, three boilers, three furnaces, ten thousand solid feet of brick-work; all then and there being parcel of the freehold of the said premises so possessed and held by the said Gerrit W. Bell and the said Union Club of San Francisco respectively, as such tenants of the said plaintiff respectively, of great value, to wit, of the value of thirty thousand dollars; and thereby greatly weakened, damaged, spoiled, ruined, and wasted the said premises so held by the said Gerrit W. Bell and the said Union Club of San Francisco respectively, of the said plaintiff as aforesaid, whereby the same were rendered untenantable for a long space of time, to wit, for the space of six months next thereafter, in consequence whereof the same were surrendered and abandoned by the said tenants of the said plaintiff; and the plaintiff was, by reason of their said injured, ruined, and wasted condition, unable to rent the same out, or to obtain any rent or hire for the same as he
otherwise could and would have done, to wit, for the aforesaid
53 space of six months next ensuing the said explosion; by all which
premises in this count mentioned, the said plaintiff was greatly injured and damaged in his aforesaid reversionary estate of inheritance, in the said premises so occupied and possessed by the said Gerrit W. Bell and the said Union Club of San Francisco in this count described, and lost the rents, profits, and gains he would otherwise have received from the said premises, amounting to six thousand dollars, to the damage of the said plaintiff of thirty thousand dollars.

III. And for a further and separate cause of action the said plaintiff further shows, that the said defendants, before and at the time of the committing of the grievances hereinafter next mentioned, to wit, on the 16 day of April, 1866, were lawfully in possession of a portion of the following described premises, namely: All that certain lot of land on the northwestern corner of California and Montgomery streets, in the city of San Francisco, with its front on the west side of Montgomery street, extending thereon sixty-five feet ten inches northwardly from the said corner of California street, and its southerly side extending along the north side of California street, one hundred and thirty-seven feet six
inches westwardly from Montgomery street, the most westwardly
54 sixty-one feet six inches of said lot having a depth from Cali-
fornia street northwardly of one hundred and thirty-seven feet and six inches, together with a granite building, three brick buildings, one iron building, and various other structures, erections, and fixtures thereon. And that said defendants were so in possession of said portion of said premises, and held and occupied the same as tenants thereof to the plaintiff, to whom the immediate reversion thereof belonged, under a certain demise thereof, theretofore made to the defendants, at and under a certain rent therefor, payable by the defendants to the plaintiff, and that a certain other portion of said premises was in the possession and occupation of one Gerrit W. Bell, who held the same as tenant of the plaintiff; and a certain other portion of said premises was in the possession and occupation of a certain corporation known as the Union Club of San Francisco which held the same as tenant of the plaintiff, to whom the immediate reversion, reversionary estate, and interest of,

in, and to said last-mentioned portions of said premises, and of the entire premises above in this count described likewise then and ever since belonged.

That the said defendants, whilst the said first-mentioned portion of said premises was so in their possession and occupation as tenants
55 thereof to the plaintiff, and whilst the immediate reversion, reversionary estate, and interest of, in, and to the whole of the said premises belonged to the plaintiff, did, by themselves and their servants, negligently and carelessly, and without proper precaution, bring and introduce, and cause and procured to be introduced, and suffer and permit to be brought and introduced, into, and upon, and within the said portion of said premises, which was so in their possession and occupation as last aforesaid, a certain box or package containing some highly dangerous explosive substance, compound, or preparation, the composition of which is to the plaintiff unknown; and whilst the said box or package so containing the said highly dangerous explosive substance, compound, or preparation aforesaid, was within and upon the last-mentioned portion of said premises, and in the charge and custody, and under the control of the defendants, the said defendants, by themselves and their servants, so negligently and carelessly conducted themselves in respect to said box or package, and the aforesaid substance, compound, or preparation therein contained, and so carelessly and negligently treated the same, and took so little and such bad care thereof, and so little precaution to prevent injury therefrom, that the said substance, compound, or preparation, exploded with great violence, and threw down, destroyed, damaged, and defaced, various portions of the walls, roofs, floors, partitions, ceiling, stairs, doors, win-
56 dows, wainscoting, sky-lights, water-closets, pipes, and other parts of the last-mentioned portions of said premises, and also of the aforesaid other portions of said premises, of which the said Union Club of San Francisco and the said Gerrit W. Bell were severally in possession as aforesaid.

That, by reason of such throwing down, destruction, and damage of and to said premises as aforesaid, the plaintiff was greatly damaged and injured in his reversion, reversionary estate, and interest in and to said premises; and the said portions of said premises of which the said Gerrit W. Bell and the said Union Club were severally and respectively in possession as aforesaid, were thereby rendered untenable and unfit for and incapable of occupation, and were, in consequence thereof, vacated and surrendered and abandoned to the plaintiff, and so remained and continued for the period of six months or thereabouts, which period was necessarily occupied and consumed in repairing the same and replacing them in a tenantable condition, and, by reason of such surrender and abandonment, the plaintiff lost and was deprived of the rent of the said last-mentioned portions of said premises, which would otherwise have accrued to him and been received by him from the said Union Club and the said Gerrit W Bell respectively, amounting to six thousand dollars in gold coin of the United States.

Wherefore and by reason of the premises in this count men-
57 tioned, the said plaintiff sustained damages to the amount of fifty thousand dollars.

And the plaintiff therefore asks judgment against the said defendants for treble the damages sustained by him by reason of the waste in the first count or cause of action hereinabove set forth, amounting to sixty thousand dollars, and also for the other damages by him sustained

by reason of the other matters hereinabove set forth, amounting in all to one hundred thousand dollars, besides costs.

San Francisco, October 25, 1867.

DOYLE AND BARBER,
Att'ys for Pl'ffs.

(Endorsed:) U. S. circuit court dist. of Cal'a. Filed Oct. 28, 1867. Geo. C. Gorham, cl'k, p'r Wheeler, dep.

58 *Demurrer.*

In the circuit court of the United States for the district of California, ninth circuit.

JOHN PARROTT
vs.
D. N. BARNEY, HENRY WELLS, THOMAS N. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co.

And the said defendants, D. N. Barney, Henry Wells, Thomas N. Janes, William G. Fargo, Louis McLane, and James McKay, demur to the complaint herein of said plaintiff, John Parrott, and for causes of demurrer show:

I. That the said first count or cause of action in said complaint contained does not state facts sufficient to constitute a cause of action.

II. That the said second count or cause of action in said complaint contained does not state facts snfficient to constitute a cause of action.

III. That the said third count or cause of action in said com-
59 plaint contained does not state facts sufficient to constitute a cause of action.

E. CASSERLY,
Attorney for Defendants.

(Endorsed:)

We hereby admit due service of the within demurrer by copy this 5th day of March, 1868.

DOYLE AND BARBER,
Att'ys for Pl'ff.

Filed March 5, 1868. Geo. E. Whitney, cl'k, by A. D. Smith, D. C.

60 *Order overruling demurrer.*

At a stated term of the circuit court of the United States of America, for the district of California, held at the court-room in the city of San Francisco, on Monday, the 30th day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

Present, the Honorable Matthew P. Deady, district judge.

JOHN PARROTT
v.
D. N. BARNEY & AL.

In this cause it is now ordered by the court that the demurrer to the

complaint herein, heretofore submitted to the court for consideration and decision, be, and the same hereby is, overruled, with leave to defendants to answer within ten days on payment of twenty dollars (U. S. gold coin) costs—$20.00

(Endorsed:)

I hereby certify that the foregoing is a full and true copy of an original order made and entered in the above-entitled action.

Attest my hand and seal of said circuit court this 22d day of April, A. D. 1871.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

61 *Answer.*

In the circuit court of the United States for the district of California, ninth circuit.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co.

The defendants in this action, the said D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, answer the complaint of the plaintiff herein, said John Parrott, as follows:

I. For answer to the said complaint they deny each and every allegation in said complaint contained.

II. For answer to the first count of said complaint, they deny each and every allegation of said count.

III. For a further and separate answer to the said first count, they deny that at the said several times, or any of them, or at the place in said count or in the said complaint mentioned, they, the said
62 defendants, or any of them, were copartners, trading or doing business under the firm-name of Wells, Fargo & Co. or any other name.

They further deny that, on the 16th of April, 1866, or at any time before the commencement of this action, the said plaintiff was seized in fee or otherwise of said certain lot of land in the city and county of San Francisco, at the northwesterly corner of Montgomery and California streets, in said city and county, and bounded and described as in said first count set forth or any part thereof, or of the buildings thereon erected, as in the said first count alleged, or any of them, as in the said first count described; or that there were at any time prior to the commencement of this action such buildings, or any of them, on said lot of land.

And the said defendants further deny that they, or any of them, were then and there trading and doing business as aforesaid, or were the possessors or occupiers of a portion of the said premises as in the first count described, or of any part thereof, or of the appurtenances thereunto belonging, or any of them, as in said first count described; or that, during all the said time or during any time, they or any of them

held the same, or any part thereof, of the said plaintiff, as his tenants, from year to year, or at or under "certain yearly rent, to wit, the yearly rent of twelve thousand ($12,000) dollars," or any other rent, or as tenants of the plaintiff in any manner otherwise; or that the
63 reversion thereof was during all the said time, or for any time remaining, in him, the said plaintiff.

And the defendants further deny that while they occupied or possessed the same or any part thereof, as such tenants as aforesaid, (or that they ever did so occupy or possess the same,) they or any of them did, on the said 16th day of April, 1866, or at any other time before the commencement of this action, by themselves or their servants, or in any manner otherwise, carelessly, negligently, improperly, or improvidently, or in any manner otherwise, introduce, or cause or procure to be introduced, or suffer or permit to be introduced, in the said or any portion of the said premises, so untruly alleged to have been occupied by them as aforesaid, certain or any explosive substance or substances; or that they or any of them did then and there, or otherwise, by themselves or their servants, or in any manner otherwise, so carelessly, negligently, improperly, or improvidently conduct themselves, in or about the managing, keeping, examining, opening, handling, moving, striking, or percussing of the said alleged substance or substances, or the containers thereof that the same or any of them exploded with great or any force or violence, or then or there, by means or force of the said explosion or otherwise, broke down, wasted, or destroyed the several articles of property in said first count fully described and alleged to have
64 been parcel of the freehold of the said premises, or any part thereof, or that the same were of the value of twenty thousand ($20,000) dollars or any less sum; or that they or any of them thereby or otherwise greatly or at all weakened, damaged, spoiled, ruined, or wasted said premises, untruly alleged to have been so held by them of the said plaintiff, or any part thereof, to the waste, destruction, or injury of the alleged reversionary or other estate of the said plaintiff therein, or that the plaintiff was or is thereby greatly or at all damaged or injured, of or in his alleged estate of inheritance of, or in his alleged buildings, houses, or land, with the appurtenances or any part thereof, or his alleged reversionary estate therein against the form of the statute in such case made and provided; or to the damage to the plaintiff *is* twenty thousand ($20,000) dollars or any less sum.

IV. And the said defendants, for answer to the second count of the said complaint, deny each and every allegation of the said second count respecting the same.

And for a further and separate answer to the said second count, the said defendants deny that, on the said 16th day of April, 1866, or at any time before the commencement of this action, said plaintiff was or still is seized, in fee or otherwise, of the lot or parcel of land in the said city and county, and in the said first count of the said complaint de-
65 scribed, or any part thereof, or of the buildings thereon erected, being the same in the first count described, or any part thereof; or that one Gerrit W. Bell, or any other person, was then and there the possessor or occupier of a portion of said buildings and premises, namely, of the first floor of the said iron-building, and of that of the said brick building, situate to the northward thereof, and called the "furnace," or of any portion of the said buildings or premises; or that a certain corporation called the Union Club of San Francisco, or any other person or persons were then and there the possessors or occupiers of another portion of the said premises, namely, of the whole thereof

complaint herein, heretofore submitted to the court for consideration and decision, be, and the same hereby is, overruled, with leave to defendants to answer within ten days on payment of twenty dollars (U. S. gold coin) costs—$20.00

(Endorsed:)

I hereby certify that the foregoing is a full and true copy of an original order made and entered in the above-entitled action.

Attest my hand and seal of said circuit court this 22d day of April, A. D. 1871.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

61 *Answer.*

In the circuit court of the United States for the district of California, ninth circuit.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co.

The defendants in this action, the said D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, answer the complaint of the plaintiff herein, said John Parrott, as follows:

I. For answer to the said complaint they deny each and every allegation in said complaint contained.

II. For answer to the first count of said complaint, they deny each and every allegation of said count.

III. For a further and separate answer to the said first count, they deny that at the said several times, or any of them, or at the place in said count or in the said complaint mentioned, they, the said
62 defendants, or any of them, were copartners, trading or doing business under the firm-name of Wells, Fargo & Co. or any other name.

They further deny that, on the 16th of April, 1866, or at any time before the commencement of this action, the said plaintiff was seized in fee or otherwise of said certain lot of land in the city and county of San Francisco, at the northwesterly corner of Montgomery and California streets, in said city and county, and bounded and described as in said first count set forth or any part thereof, or of the buildings thereon erected, as in the said first count alleged, or any of them, as in the said first count described; or that there were at any time prior to the commencement of this action such buildings, or any of them, on said lot of land.

And the said defendants further deny that they, or any of them, were then and there trading and doing business as aforesaid, or were the possessors or occupiers of a portion of the said premises as in the first count described, or of any part thereof, or of the appurtenances thereunto belonging, or any of them, as in said first count described; or that, during all the said time or during any time, they or any of them

held the same, or any part thereof, of the said plaintiff, as his tenants, from year to year, or at or under "certain yearly rent, to wit, the yearly rent of twelve thousand ($12,000) dollars," or any other rent, or as tenants of the plaintiff in any manner otherwise; or that the
63 reversion thereof was during all the said time, or for any time remaining, in him, the said plaintiff.

And the defendants further deny that while they occupied or possessed the same or any part thereof, as such tenants as aforesaid, (or that they ever did so occupy or possess the same,) they or any of them did, on the said 16th day of April, 1866, or at any other time before the commencement of this action, by themselves or their servants, or in any manner otherwise, carelessly, negligently, improperly, or improvidently, or in any manner otherwise, introduce, or cause or procure to be introduced, or suffer or permit to be introduced, in the said or any portion of the said premises, so untruly alleged to have been occupied by them as aforesaid, certain or any explosive substance or substances; or that they or any of them did then and there, or otherwise, by themselves or their servants, or in any manner otherwise, so carelessly, negligently, improperly, or improvidently conduct themselves, in or about the managing, keeping, examining, opening, handling, moving, striking, or percussing of the said alleged substance or substances, or the containers thereof that the same or any of them exploded with great or any force or violence, or then or there, by means or force of the said explosion or otherwise, broke down, wasted, or destroyed the several articles of property in said first count fully described and alleged to have
64 been parcel of the freehold of the said premises, or any part thereof, or that the same were of the value of twenty thousand ($20,000) dollars or any less sum; or that they or any of them thereby or otherwise greatly or at all weakened, damaged, spoiled, ruined, or wasted said premises, untruly alleged to have been so held by them of the said plaintiff, or any part thereof, to the waste, destruction, or injury of the alleged reversionary or other estate of the said plaintiff therein, or that the plaintiff was or is thereby greatly or at all damaged or injured, of or in his alleged estate of inheritance of, or in his alleged buildings, houses, or land, with the appurtenances or any part thereof, or his alleged reversionary estate therein against the form of the statute in such case made and provided; or to the damage to the plaintiff *is* twenty thousand ($20,000) dollars or any less sum.

IV. And the said defendants, for answer to the second count of the said complaint, deny each and every allegation of the said second count respecting the same.

And for a further and separate answer to the said second count, the said defendants deny that, on the said 16th day of April, 1866, or at any time before the commencement of this action, said plaintiff was or still is seized, in fee or otherwise, of the lot or parcel of land in the said city and county, and in the said first count of the said complaint de-
65 scribed, or any part thereof, or of the buildings thereon erected, being the same in the first count described, or any part thereof; or that one Gerrit W. Bell, or any other person, was then and there the possessor or occupier of a portion of said buildings and premises, namely, of the first floor of the said iron-building, and of that of the said brick building, situate to the northward thereof, and called the "furnace," or of any portion of the said buildings or premises; or that a certain corporation called the Union Club of San Francisco, or any other person or persons were then and there the possessors or occupiers of another portion of the said premises, namely, of the whole thereof

above the first or lower floor of all the said buildings and premises, or of any portion of said building or premises.

And they further deny that, during the said time or any part thereof the said Bell or the said Union Club of San Francisco, had the same respectively, or any part thereof, of the said plaintiff, as his tenants, or that the same or any part thereof were possessed or occupied by them or either of them as such tenants, from month to month, or in any manner otherwise, or that the reversion of the same or of any part thereof was at any time remaining in him the said plaintiff.

And they further deny that while, as untruly alleged by the plaintiff, the said last-mentioned premises were so occupied or pos-
66 sessed by the said Bell, or by the said Union Club as such tenants of the plaintiff, (or that they ever were so occupied or possessed,) or, while they, the said defendants, or any of them were, as untruly alleged by the plaintiff, trading or doing business as in the said first count alleged, or that they ever were so trading or doing business, or that they were then and there or otherwise occupying premises in the immediate or any vicinity thereof, namely, the said premises in the said first count, untruly alleged to have been possessed or occupied by them, did, or any of them afterwards, on April 16, 1866, at the place aforesaid, or at any other time or place, by themselves, or their servants, or otherwise, carelessly, negligently, or improvidently introduce, or cause or procure to be introduced, or suffer or permit to be introduced on, into, or upon, the said adjoining premises, so as untruly alleged by the plaintiff occupied by them, certain or any explosive substance or substances; or did, by themselves or their servants, so carelessly, negligently, unskillfully, improperly, or improvidently, conduct themselves in or about the managing, keeping, opening, examining, handling, moving, striking, or percussing of the said substance or substances, or the containers thereof; that the same, or any part thereof, then and there exploded with great or any force or violence, or then and there, by means and force of the said explosion or other-
67 wise, broke down, wasted, or destroyed divers articles of property in said second count fully described, and alleged to be then and there parcel of the freehold of the said premises, untruly alleged, as possessed and held by the said Bell and the said Union Club of San Francisco respectively, as such tenants of plaintiff, or any portion of such property, or that the same were of the value of thirty thousand ($30,000) dollars, or any less sum of money, or thereby greatly, or at all weakened, damaged, spoiled, ruined, or wasted said premises or any part of them, untruly alleged in the said count to have been so held by the said Bell and the said Union Club of San Francisco, of the said plaintiff, as aforesaid, or that the same were rendered untenantable for the space of six (6) months next thereafter, or for any time whatever, or in any manner whatever, or that the same or any part thereof were surrendered or abandoned by the said alleged tenants of the plaintiff, or any of them, or that the plaintiff was, for the reason in said second count alleged or otherwise, unable to rent the same, or to obtain any rent or hire for the same for the said six months next ensuing said alleged explosion, or for any time whatever.

They further deny that, by reason of the premises in said second count mentioned, or any of them, the said plaintiff was greatly, or at all injured or damaged in his alleged reversionary estate of inheritance in the said premises, untruly alleged to have been so occupied and possessed
68 by the said Bell and the said Union Club of San Francisco; or that the loss of rents, profits, or gains, which, as alleged, he would have received from the said premises, amounted to six thousand ($6,000)

dollars or any less sum; or that the said plaintiff would have received from said premises any rents, profits, or gains, in any sum whatever.

They further deny that the said plaintiff was damaged in thirty thousand ($30,000) dollars or any less sum.

VI. The said defendants, answering the third count of the said complaint, deny each and every allegation in the said count contained.

VII. And, for a further answer to the said third counts, the said defendants deny that, on April 16, 1866, or at any time before the commencement of this action, they, or any of them were, lawfully or otherwise, in possession of any portion of the premises described in the said third count, or of any of the buildings, structures, erections, or fixtures, alleged and described as being thereon; or that any such building or buildings, structures, erections, or fixtures, or any of them were thereon; or that they, the defendants, or any of them, were in possession of such portion of said premises, or held or occupied the same as tenants of the plaintiff under a certain demise theretofore made to said defendants, at or under a certain rent theretofor, or in any manner as tenants of the said plaintiff; or that the immediate, or any reversion thereof belonged to the said plaintiff. And they deny that
69 a certain other portion, or any portion of said premises was in the possession or occupation of said Gerrit W. Bell, or that he held the same as tenant of the plaintiff or otherwise; or that a certain other or any portion of said premises was in the possession or occupation of said corporation known as the Union Club of San Francisco; or that said corporation held the same as tenant of the plaintiff in any manner whatever; or that the immediate or any reversion, reversionary estate, or interest of, in, or to said last-mentioned portions of said premises, or any of them, or of all the entire premises in said count described, or any portion thereof, did then or at any time before the commencement of this action belong to the plaintiff.

The said defendants further deny that, during the period of their possession or occupation of said described portion of said premises, as untruly alleged in said third count, or at any time before the commencement of this action, they, or any of them, by themselves or their servants, or otherwise, did, negligently or carelessly, or, without proper precaution, bring or introduce, or cause, or procure to be brought or introduced, or suffered or permitted to be brought or introduced, into or upon, or within the said or any portion of said premises, untruly alleged to have been in their possession and occupation, a certain or any box, or package, containing some highly or at all dangerous,
70 explosive substance, compound, or preparation; or that while the said box or package so containing such substance, compound, or preparation, so within or upon the said or any portion of said premises, or in the charge, custody, or control of the defendants, or any of them, or that the same was upon said premises or any part thereof, or in the charge, custody, or control of the defendants or any of them; or that the said defendants, or any of them, did, by themselves or their servants, so negligently or carelessly, or otherwise, conduct themselves in respect to said box or package or the aforesaid substance, compound, or preparation therein contained, or so carelessly or negligently treat the same, or take so little or such bad care thereof, or so little precaution to prevent injury therefrom, that the said substance, compound, or preparation exploded with great or any violence, or threw down, destroyed, damaged, or displaced various or any portions of the walls, roof, floors, partitions, ceilings, stairs, doors, windows, wainscoting, sky-lights, water-closets, pipes, or any of them, or the other parts or any of them, of the said last-mentioned portion of said premises, or of the afore-

said other portions of said premises of which the said Union Club of San Francisco, and the said Bell were, as alleged, in possession, or of any portion of said premises whatever.

71 They further deny that, by reason of such alleged throwing down, destruction, or damage of, or to said premises, or otherwise, the plaintiff was greatly or at all damaged or injured in his reversion, reversionary estate, or interest in or to said premises, or the said portions of said premises of which, as untruly alleged, the said Bell and the said Union Club were in possession as aforesaid; or that the said plaintiff ever had any reversion, reversionary estate, or interest in or to said premises or part thereof; or that the said portions of said premises were thereof rendered untenantable and unfit wholly or partly for, or incapable of, occupation, or in consequence thereof vacated or surrendered or abandoned to the plaintiff, and so remained or continued for the period of six (6) months or thereabouts, or any period whatever; or that said period or any period was necessarily, or, in fact, occupied or consumed in repairing the same, or replacing them in a tenantable condition; or that, by reason of such alleged surrender or abandonment, the plaintiff lost or was deprived of the rent of said portions of said premises, or of any part thereof, or that said rent would otherwise have accrued to him, or been received by him from the said Union Club and the said Gerrit W. Bell respectively, or either of them; or that such rent amounted to six thousand ($6,000) dollars, in gold coin of the United States, or any less sum.

They further deny that thereby, or by reason of the premises in said third count contained, the said plaintiff sustained damages to the

72 amount of fifty thousand ($50,000) dollars, or any less sum.

VIII. And for a further and separate answer to the said complaint and the whole thereof, the said defendants allege as follows:

That, on said 16th day of April, 1866, and long previous thereto, they, the said defendants, were and had been carrying on, in said city of San Francisco, a banking and express business, under the name and style of Wells, Fargo & Co.

That their said express business, which was then and there very extensive, was of the usual character and description of such business as known and carried on in the United States, and consisted of the receiving, carrying, forwarding, and delivering for hire, by land or water, in and out of the said State of California, the goods and chattels of others of every description, said goods and chattels being almost universally contained in close boxes, cases, or packages.

That, on said 16th day of April, 1866, the defendants were, and long before had been, in the use and occupation of certain premises in said city of San Francisco, being the same fully described in the first count of said complaint as a portion of certain premises, and were so in the use and occupation thereof, in and for the purposes of their said express business, as tenants of the plaintiff, from year to year, holding over under an indenture of lease, wherein and whereby it was, among

73 other things, agreed and provided by and between the said plaintiff and the said defendants, that the said premises should be used by the said defendants in and for their business and calling, as banking and express offices, subject only to the exception that the defendants should not receive into said premises, or allow any person to place therein gunpowder, alcohol, or any other articles dangerous from their combustibility; and also that, at the expiration of the said tenancy of the defendants, they would quit and surrender the said demised premises, with all fixtures therein contained in as good condition as the reason-

able use and wear thereof would permit, damages by the elements excepted.

That, at and before the commencement of said tenancy from year to year, and during the same, the said plaintiff had full actual notice of the nature and character of the said express business of the defendants, and was well acquainted therewith.

That, on said 16th day of April, 1866, the said defendants, so being such tenants from year to year, of the plaintiff, did, in the usual course of their said express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, receive into and upon the said premises so occupied and used by them in and for their express business, a certain close wooden box or package, which had been carried by sea from New York to said San Fancisco, by way of the Isthmus of Panama, and was so delivered
74 to them in their express business for transshipment and forwarding to a point in the interior of the said State of California, the same showing then and there on the outside signs of leakage; and while they, the said defendants, then and there in the like manner, in the usual course of their express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, were handling or moving the same, or opening or proceeding to open the same, for the purpose of ascertaining and stopping the said leakage, the contents of said box or package did, without any fault of theirs, explode with great force and violence, and such explosion then and there broke, injured, and destroyed certain portions of the entire premises in the said complaint described, including that portion of said premises used and occupied by the defendants, namely, certain portions of the walls, roofs, floors, ceilings, stairs, doors, windows, and other parts of the said buildings and premises, which are the same wrongs and injuries by the said plaintiff herein complained of. But the said defendants deny that, by reason of the premises, the said plaintiff was damaged in the sum of one hundred thousand ($100,000) dollars, as in the said complaint set forth, or in any less sum.

The said defendants further allege that said box or package was without any exterior marks or signs to indicate its contents, or
75 the nature thereof, and the said contents were wholly unknown to them, or any of them, nor had they, or any of them, any notice thereof, express or implied, or of their character or nature; and same were not gunpowder or alcohol, or any other article dangerous from its combustibility, but were a certain new substance, or preparation, or composition wholly unknown to the defendants, or any of them, and also unknown in commerce, and then and there introduced for the first time into said State of California; that said substance, or preparation, or composition, is known as nitro-glycerine, and is not combustible, nor dangerous from combustibility, nor explosive by fire, but is, and then and there was highly explosive from or by percussion or concussion in the course of ordinary moving or handling, or of opening or attempting to open the box or package containing the same, or spontaneously, or without any such concussion or percussion.

And except, as aforesaid in this further and separate answer set forth, they, the said defendants, deny each and every allegation of the said complaint and of each count thereof.

E. CASSERLY,
Att'y for Defendants.

(Endorsed:) Filed April 14, 1868. Geo. E. Whitney, cl'k, by A. D. Smith, D. C.

76 *Amended answer.*

In the circuit court of the United States for the district of California, ninth circuit.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co. } Amended answer by leave of the court.

The defendants in this action, the said D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, answer the complaint of the plaintiff herein, said John Parrott, as follows:

I. For answer to the said complaint they deny each and every allegation in said complaint contained.

II. For answer to the first count of said complaint they deny each and every allegation of said count.

III. For a further and separate answer to the said first count, they deny that, at the said several times, or any of them, or at the place
77 in said count, or in the said complaint mentioned, they, the said defendants, or any of them, were copartners, trading or doing business under the firm-name of Wells, Fargo & Co., or any other name.

They further deny that, on the said 16th of April, 1866, or at any time before the commencement of this action, the said plaintiff was seized in fee, or otherwise, of said certain lot of land in the city and county of San Francisco, at the northwesterly corner of Montgomery and California streets, in said city and county, and bounded and described as in said first count set forth, or any part thereof; or of the buildings thereon erected, as in the said first count alleged, or any of them, as in said first count described; or that there were, at any time prior to the commencement of this action such buildings or any of them on said lot of land.

And the said defendants further deny, that they or any of them were then and there trading and doing business as aforesaid, or were the possessors or occup'ers of a portion of the said premises, as in the first count described, or of any part thereof, or of the appurtenances thereunto belonging, or any of them, as in said first count described; or that, during all the said time or during any time, they, or any of them, held the same or any part thereof, of the said plaintiff, as his tenants from year to year, or at or under "certain yearly rent, to wit, the yearly rent of twelve thousand ($12,000) dollars," or any other rent, or as tenants of the
78 plaintiff in any manner otherwise; or, that the reversion thereof was, during all the said time, or for any time, remaining in him the said plaintiff.

And the defendants further deny that, while they occupied or possessed the same or any part thereof, as such tenants as aforesaid, (or that they ever did so occupy or possess the same,) they or any of them did, on the said 16th day of April, 1866, or at any other time before the commencement of this action, by themselves or their servants, or in any manner otherwise, carelessly, negligently, improperly, or improvidently or in any manner otherwise introduce, or cause or procure to be introduced, or suffer or permit to be introduced, in the said or any portion of the said premises, so untruly alleged to have been occupied by them as aforesaid, certain or any explosive substance or substances; or that they,

or any of them, did then and there or otherwise, by themselves or their servants, or in any manner otherwise so carelessly, negligently, improperly, or improvidently conduct themselves in or about the managing, keeping, examining, opening, handling, moving, striking, or percussing of the said alleged substance or substances, or the containers thereof, that the same, or any of them exploded with great force, or any force or violence, or then and there, by means or force of the said explosion, or otherwise, broke down, wasted, or destroyed the several articles of property in said first count fully described and alleged to have been parcel of the freehold of the said premises or any part thereof; or that the
79 same were of the value of twenty thousand ($20,000) dollars, or any less sum; or that they, or any of them thereby or otherwise greatly, or at all, weakened, damaged, spoiled, ruined, or wasted said premises, untruly alleged to have been so held by them of the said plaintiff, or any part thereof, to the waste, destruction, or injury of the alleged reversionary or other estate of the said plaintiff therein; or that the plaintiff was or is thereby greatly or at all damaged or injured of, or in his alleged estate of inheritance of or in his alleged buildings, houses, or land, with the appurtenances, or any part thereof, or his alleged reversionary estate therein, against the form of the statute in such case made and provided; or to the damage to the plaintiff in twenty thousand ($20,000) dollars, or any less sum.

IV. And the said defendants, for answer to the second count of the said complaint, deny each and every allegation of the said second count respecting the same.

V. And for a further and separate answer to the said second count, the said defendants deny that, on the said 16th day of April, 1866, or at any time before the commencement of this action, said plaintiff was, or still is, seized, in fee or otherwise, of the lot or parcel of land in the said city and county and in the said first count of the said complaint described, or any part thereof, or of the buildings thereon erected, being the
80 same in the first count described, or any part thereof; or, that one Gerrit W. Bell, or any other person was then and there the possessor or occupier of a portion of said buildings and premises, namely, of the first floor of the said iron building, and of that of the said brick building, situate to the northward thereof, and called the "furnace," or of any portion of the said buildings or premises; or that a certain corporation, called the Union Club of San Francisco, or any other person or persons, were then and there the possessors or occupiers of another portion of the said premises, namely, of the whole thereof, above the first or lower floor of all the said buildings and premises, or of any portion of said buildings or premises.

And they further deny that, during the said time, or any part thereof, the said Bell, or the said Union Club of San Francisco held the same, respectively, or any part thereof, of the said plaintiff as his tenants, or that the same, or any part thereof, were possessed or occupied by them, or either of them, as such tenants from month to month, or in any manner otherwise, or that the reversion of the same, or of any part thereof, was, at any time, remaining in him, the said plaintiff.

And they further deny that while, as untruly alleged by the plaintiff, the said last-mentioned premises were so occupied or possessed by the said Bell, or by the said Union Club as such tenants of plaintiff, (or that they ever were so occupied or possessed,) or, while they,
81 the said defendants, or any of them, were, as untruly alleged by the plaintiff, trading or doing business, as in the said first count alleged, or that they were so trading or doing business, or that they

were then and there or otherwise occupying premises in the immediate or any vicinity thereof, namely, the said premises in the said first count untruly alleged to have been possessed or occupied by them, did, or any of them afterwards, on April 16, 1866, at the place aforesaid, or at any other time or place, by themselves or their servants, or otherwise, carelessly, negligently, or improperly introduce, or cause or procure to be introduced, or suffer or permit to be introduced on, into, or upon the said adjoining premises, so, as untruly alleged by the plaintiff, occupied by them, certain or any explosive substance or substances, or did, by themselves or their servants, so carelessly, negligently, or unskilfully, improperly, or improvidently conduct themselves in or about the managing, keeping, opening, examining, handling, moving, striking, or percussing of the said substance or substances, or the containers thereof, that the same, or any part thereof, then and there exploded with great or any force or violence, or then and there, by means and force of the said explosion, or otherwise, broke down, wasted, or destroyed divers articles of property in said second count fully described, and
82 alleged to be then and there parcel of the freehold of the said premises, untruly alleged as possessed and held by the said Bell and the said Union Club of San Francisco, respectively, as such tenants of plaintiff, or any portion of such property, or that the same were of the value of thirty thousand ($30,000) dollars, or any less sum of money, or thereby greatly or at all weakened, damaged, spoiled, ruined, or wasted said premises, or any part of them, untruly alleged in the said count to have been so held by the said Bell and the said Union Club of San Francisco of the said plaintiff as aforesaid, or that the same were rendered untenantable for the space of six (6) months next thereafter, or for any time whatever, or in any manner whatever, or that the same, or any part thereof, were surrendered or abandoned by the said alleged tenants of the plaintiff, or any of them, or that the plaintiff was, for the reason in said second count alleged, or otherwise, unable to rent the same, or to obtain any rent or hire for the same for the said six months next ensuing said alleged explosion, or for any time whatever.

They further deny that, by reason of the premises in said second count mentioned, or any of them, the said plaintiff was greatly or at all injured or damaged in his alleged reversionary estate of inheritance in the said premises, untruly alleged to have been so occupied and
83 possessed by the said Bell and the said Union Club of San Francisco, or that the loss of rents, profits, or gains which, as alleged, he would have received from the said premises amounted to six thousand ($6,000) dollars, or any less sum, or that the said plaintiff would have received from said premises any rents, profits, or gains, in any sum whatever.

They further deny that the said plaintiff was damaged in thirty thousand ($30,000) dollars, or any less sum.

VI. The said defendants, answering the third count of the said complaint, deny each and every allegation in the said count contained.

VII. And, for a further answer to the said third count, the said defendants deny that, on April 16, 1866, or at any time before the commencement of this action, they, or any of them, were lawfully or otherwise in possession of any portion of the premises described in the said third count, or of any of the buildings, structures, erections, or fixtures alleged and described as being thereon, or that any such building, or buildings, structures, erections, or fixtures, or any of them, were thereon, or that they, the defendants, or any of them, were in possession of such portion of said premises, or held or occupied the same as tenants

of the plaintiff under a certain demise theretofore made to the
84 said defendants, at or under a certain rent therefor, or in any manner as tenants of the said plaintiff, or that the immediate or any reversion thereof belonged to the said plaintiff. And they deny that a certain other portion, or any portion of said premises was in the possession or occupation of said Gerrit W. Bell, or that he held the same as tenant of the plaintiff or otherwise, or that a certain other or any portion of said premises was in the possession or occupation of said corporation known as the Union Club of San Francisco, or that said corporation held the same as tenant of the plaintiff in any manner whatever, or that the immediate or any reversion, reversionary estate, or interest of, in, or to said last-mentioned portions of said premises, or any of them, or all the entire premises in said count described, or any portion thereof, did then, or at any time before the commencement of this action belong to the plaintiff.

The said defendants further deny that, during the period of their possession or occupation of said described portion of said premises, as untruly alleged in said third count, or at any time before the commencement of this action, they, or any of them, by themselves or their servants, or otherwise, did, negligently or carelessly, or without proper precaution, bring or introduce, or cause, or procure to be brought or introduced, or suffered, or permitted to be brought or introduced,
85 into or upon or within the said, or any portion of said premises untruly alleged to have been in their possession and occupation, a certain or any box or package, containing some highly, or at all dangerous explosive substance, compound, or preparation; or that, while the said box or package so containing such substance, compound, or preparation, so within or upon the said or any portion of said premises, or in the charge, custody, or control of the defendants, or any of them, or that the same was upon said premises or any part thereof, or in the charge, custody, or control of the defendants, or any of them, or that the said defendants, or any of them, did, by themselves or their servants, so negligently or carelessly, or otherwise, conduct themselves in respect to said box or package, or the aforesaid substance, compound, or preparation therein contained, or so carelessly or negligently treat the same, or take so little or such bad care thereof, or so little precaution to prevent injury therefrom, that the said substance, compound, or preparation, exploded with great or any violence, or threw down, destroyed, damaged, or displaced various or any portions of the walls, roofs, floors, partitions, ceilings, stairs, doors, windows, wainscoting, sky-lights, water-closets, pipes, or any of them, or the other parts, or any of them of the said last-mentioned portion of said premises, or of the aforesaid other portions of said premises, of
86 which the said Union Club of San Francisco and the said Bell were, as alleged, in possession; or of any portion of said premises whatever.

They further deny that by reason of such alleged throwing down, destruction, or damage of or to said premises, or otherwise, the plaintiff was greatly or at all damaged or injured in his reversion, reversionary estate, or interest in or to said premises or the said portions of said premises of which, as untruly alleged, the said Bell and the said Union Club were in possession as aforesaid; or that the said plaintiff ever had any reversion, reversionary estate, or interest in or to said premises or any part thereof; or that the said portions of said premises were thereby rendered untenantable and unfit, wholly or partly for or incapable of occupation, or in consequence thereof vacated or surrendered,

or abandoned to the plaintiff, and so remained or continued for the period of six (6) months or thereabouts, or any period whatever; or that said period, or any period, was necessarily, or, in fact, occupied or consumed in repairing the same, or replacing them in a tenantable condition; or that by reason of such alleged surrender or abandonment the plaintiff lost or was deprived of the rent of said portions of said premises, or of any part thereof, or that said rent would otherwise have accrued to him or been received by him from the said Union Club and the said Gerrit W. Bell, respectively, or either of them; or that such rent amounted to six thousand ($6,000) dollars, in gold coin of the
87 United States, or any less sum.

They further deny that thereby, or by reason of the premises in said third count mentioned the said plaintiff sustained damages to the amount of fifty thousand ($50,000) dollars, or in any less sum.

VIII. And, for a further and separate answer to the said complaint and the whole thereof, the said defendants allege as follows:

That, on said 16th day of April 1866, and long previous thereto, they, the said defendants, were and had been carrying on in said city of San Francisco, a banking and express business under the name and style of Wells, Fargo & Co.

That their said express business which was then and there very extensive, was of the usual character and description of such business as known and carried on in the United States, and consisted of the receiving, carrying, forwarding, and delivering for hire by land or water, in and out of the said State of California, the goods and chattels of others of every description, said goods and chattels being almost universally contained in close boxes, cases, or packages.

That, on said 16th day of April, 1866, the defendants were, and long before had been, in the use and occupation of certain premises in said city of San Francisco, being the same fully described in the first
88 count of said complaint, as a portion of certain premises, and, were so in the use and occupation thereof in and for the purposes of their said express business, as tenants of the plaintiff from year to year, holding over under an indenture of lease, wherein and whereby it was, among other things, agreed and provided by and between the said plaintiff and the said defendants, that the said premises should be used by the said defendants in and for their business and calling as banking and express offices, subject only to the exception that the defendants should not receive into said premises, or allow any person to place therein gunpowder, alcohol, or any other articles dangerous from their combustibility; and also that, at the expiration of the said tenancy of the defendants, they would quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof would permit, damages by the elements excepted.

That, at and before the commencement of said tenancy, from year to year, and during the same, the said plaintiff had full actual notice of the nature and character of the said express business of the defendants, and was well acquainted therewith.

That, on said 16th day of April, 1866, the said defendants so being such tenants from year to year of the plaintiff, did, in the usual course of their said express business, and in the exercise of
89 due care and diligence, and without any negligence, bad care, or want of care on their part, receive into and upon the said premises so occupied and used by them in and for their express business a certain close wooden box or package, which had been carried by sea

from New York to said San Francisco by way of the Isthmus of Panama, and was so delivered to them in their express business for transshipment and forwarding to a point in the interior of the said State of California, the same showing then and there on the outside signs of leakage; and while they, the said defendants, then and there, in the like manner in the usual course of their express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part were handling and moving the same, or opening or proceeding to open the same for the purpose of ascertaining and stopping the said leakage, the contents of said box or package did, without any fault of theirs, explode with great force and violence, and such explosion then and there broke, injured, and destroyed certain portions of the entire premises in the said complaint described, including that portion of said premises used and occupied by the defendants, namely: certain portions of the walls, roofs, floors, ceilings, stairs, doors, windows, and other parts of the said buildings and premises; which are the same wrongs and injuries by the said plaintiff herein complained of.

90 But the said defendants deny that, by reason of the premises, the said plaintiff was damaged in the sum of one hundred thousand ($100,000) dollars as in the said complaint set forth, or in any less sum.

The said defendants further allege that the said box or package was without any exterior marks or signs to indicate its contents, or the nature thereof, and the said contents, were wholly unknown to them or any of them, nor had they, or any of them, any notice thereof, express or implied, or of their character or nature; and the same were not gunpowder or alcohol, or any other article dangerous from its combustibility, but were a certain new substance or preparation or composition, wholly unknown to the defendants, or any of them, and also unknown in commerce, and then and there introduced for the first time into said State of California; that said substance or preparation or composition is known as nitro-glycerine, and is not combustible nor dangerous from combustibility, nor explosive by fire, but is, and then and there was, highly explosive from or by percussion or concussion in the course of moving or handling, or of opening or attempting to open the box or package containing the same, or spontaneously and without any such concussion or percussion.

And, except as aforesaid in this further and separate answer set forth, they, the said defendants, deny each and every allegation of the

91 said complaint, and of each count thereof.

IX. And, for a further and separate answer to the 1st and 3d counts of the said complaint, the said defendants allege as follows:

That, on said 16th day of April, 1866, and long previous thereto, they, the said defendants, were, and had been, carrying on in said city of San Francisco, a general banking and express business, under the name and style of Wells, Fargo & Co.

That their said express business, which was then and there very extensive, was of the usual character and description of such business as known and carried on in the United States, and consisted of the receiving, carrying, forwarding, and delivering for hire by land or water, in and out of the said State of California, the goods and chattels of others, of every description, said goods and chattels, being almost universally contained in close boxes, cases or packages.

That, on said 16th day of April, 1866, the defendants were, and long before had been in the use and occupation of certain premises in said city of San Francisco, being the same fully described in the first count of said complaint, as a portion of certain premises, and were so in the use and occupation thereof, in and for the purpose of their said express

business as tenants of the plaintiff, holding over under an indenture of lease, wherein and whereby it was, among other things, agreed and
92 provided by and between the said plaintiff and the said defendants, that the said premises should be used by the said defendants in and for their business and calling as banking and express offices, subject only to the exception that the defendants should not receive into said premises, or allow any person to place therein gunpowder, alcohol, or any other articles dangerous from their combustibility; and also that, at the expiration of said tenancy of the defendants, they would quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof would permit, damages by the elements excepted.

That, at and before the commencement of said tenancy, and during the same, the said plaintiff had full actual notice of the nature and character of the said express business of the defendants, and was well acquainted therewith.

That, on said 16th day of April, 1866, the said defendants so being such tenants of the plaintiff, did, in the usual course of their said express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care, on their part, receive into and upon the said premises so occupied and used by them, in and for their express business, a certain close wooden box or package which had been carried by sea from New York to San Francisco, by way of the Isthmus of Panama, and was so delivered to them in their express
93 business, for transshipment and forwarding to a point in the interior of said State of California, the same showing then and there, on the outside, signs of leakage; and while they, the said defendants, then and there in the like manner, in the usual course of their express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, were causing the same to be examined to ascertain its contents, and any injury to the same, the contents of said box or package, did, without any fault of theirs, explode, with great force and violence, and such explosion then and there broke, injured, and destroyed certain portions of the entire premises, in the said complaint described, including that portion of said premises used and occupied by the defendants, namely: certain portions of the walls, roofs, floors, ceilings, stairs, doors, windows, and other parts of the said buildings and premises, which are the same wrongs and injuries by the said plaintiff herein complained of. But the said defendants deny that, by reason of the premises the said plaintiff was damaged in the sum of one hundred thousand ($100,000) dollars, as in the said complaint set forth, or in any less sum.

The said defendants further allege that the said box or package was without any exterior marks or signs, to indicate its contents or
94 the nature thereof, and the said contents were wholly unknown to them, or any of them, nor had they, or any of them, notice thereof, express or implied, or of their character or nature, and the same were not gunpowder or alcohol, or any other article dangerous from its combustibility, but were a certain new substance or preparation or composition wholly unknown to the defendants, or any of them, and also unknown in commerce, and then and there introduced for the first time into said State of California.

That said substance or preparation or composition is known as nitroglycerine, and is not combustible, nor dangerous from combustibility, nor explosive by fire, but is and then and there was highly explosive from or by percussion or concussion, in the course of moving or handling, or of

opening or attempting to open the box or package containing the same, or spontaneously, and without any such concussion or percussion.

And, the defendants aver that, after the happening of the said injury aforesaid, caused by the said explosion, and before the expiration of said demise by the plaintiff to these defendants, that is to say, between said 16th day of April, 1866, and the 31st day of December, 1866, and long before the commencement of this action, the said defendants, at their own cost and expense, and by the consent, concurrence, and approbation of said plaintiff, caused the said premises so leased and
95 demised to the defendants, and so occupied by them, with all the fixtures therein contained, to be repaired, restored and put in as good, and in fact, better condition, than the same were before the happening of said explosion and injury to the cost of the defendants of about or near ten thousand dollars; and the same has thence hitherto remained so fully repaired and in such good condition.

And, except as aforesaid, in this amended answer set forth, they, the defendents, deny each and every allegation in the first and third counts of the said complaint.

WILSON AND CRITTENDEN,
Att'ys for Defendants.

(Endorsed:)
Service of a copy of the within amended answer hereby admitted this 13th day of November 1869.

DOYLE AND BARBER,
Pl'ff's Atty's.

Filed Nov. 13, 1869.

GEO. E. WHITNEY, *Cl'k.*
By H. F. LARDNER, *D. C.*

96 *Amended complaint.*

In the circuit court of the United States for the district of California.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of "Wells, Fargo & Co."

UNITED STATES OF AMERICA,
District of California, City and County of San Francisco:

John Parrott, plaintiff, by Doyle and Barber, his attorneys, complains of D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay, defendants, and, for cause of action states as follows:

I. That, at the several times and at the place hereinafter mentioned, the said defendants were copartners, trading and doing business under the firm-name of "Wells, Fargo & Co."

97 That he, the said plaintiff, at the time of the committing of the grievances hereinafter next mentioned, to wit, on the 16th of April, 1866, and long before that time, and continually thenceforth hitherto, has been and still is seized in his demesne as of fee of a certain lot or parcel of land, situate, lying, and being in the city and county afore-

said, at the northwesterly corner of Montgomery street and California street, in the said city and county, and bounded and described as follows, to wit: Beginning at the corner formed by the intersection of the northerly line of California street, with the westerly line of Montgomery street, and running thence westerly along the northerly side of California street, one hundred and thirty-seven and a half feet; thence northerly and parallel to Montgomery street, one hundred and thirty-seven feet six inches; thence easterly and parallel to California street, sixty-one feet six inches; thence southerly and parallel to Montgomery street, seventy-one feet eight inches; thence easterly and parallel to California street, seventy-six feet to the westerly side of Montgomery street, and thence southerly along the westerly side of Montgomery street, sixty five feet ten inches to the place of beginning; together with the buildings thereon erected, and being, to wit: a certain building of brick with granite front on California and Montgomery streets, called a granite building, and fronting sixty-five feet ten inches on Montgomery street aforesaid, and seventy-seven and one-half feet on California street aforesaid; a certain piazza or portico, subdivided into rooms and offices, to the
98 westward of the said last-mentioned building, fronting twenty feet on California street, and extending back northwardly therefrom, one hundred and seven and one-half feet; a certain covered gateway of brick lying to the westward of the piazza or portico last mentioned, and fronting twenty feet on California street, and extending back northwardly therefrom thirty feet; a certain iron building lying to the westward of said gateway, having a front of twenty-five feet on California street, and extending back northwardly therefrom forty-seven and one-half feet; a certain brick building called a furnace, immediately northward of the said iron building, and covering a rectangular parallelogram, extending along the westerly side of said lot of land twenty feet, and along the northerly side of said iron building, fifteen feet; a certain other brick building immediately northward of that last mentioned, and covering a rectangular parallelogram extending along the westerly side of said lot of ground, forty feet, and along the northerly side of said brick building called a furnace, fifteen feet; a brick building called a ware-house, immediately northward of the said last-mentioned brick building, and of the piazza or portico aforesaid, and covering a rectangular parallelogram, sixty feet long and thirty feet wide, extending along the most northerly line of the said lot of ground; a bridge con-
99 necting parts of said buildings, and ten water-closets with water-pipes and appurtenances. And the said defendants, trading and doing business as aforesaid, were then and there the possessors and occupiers of portion of the said premises, to wit, of the basement and first floor of the said building first above mentioned, and called a granite building, together with certain vaults and banking fixtures therein contained, and the said brick ware-house thirty by sixty feet lastly above-mentioned, together with the right of way and free passage thereto through the back yard of the said premises, and all appurtenances thereunto belonging, (including among said appurtenances the said water-closets, the said covered gateway, and the first story of the said brick building, forty feet long by fifteen feet wide, lying next north of the building called a furnace, and hereinbefore described;) and during all the said time held the same of the said plaintiff as his tenants thereof, from year to year, at and under a certain yearly rent, to wit, the yearly rent of twelve thousand dollars, payable by the said defendants to the said plaintiff for the same, the reversion thereof all the said time remaining in him the said plaintiff; and the said defendants, whilst they so

occupied and possessed the same as such tenants as aforesaid, to wit, on the 16th day of April, 1866, by themselves and their servants, carelessly, negligently, improperly, and improvidently introduced, and caused and procured to be introduced, and suffered and permitted
100 to be introduced, into the said portion of the said premises so occupied by them as aforesaid, certain explosive substance and substances, and then and there, by themselves and their servants, so carelessly, negligently, improperly, and improvidently conducted themselves in and about the managing, keeping, examining, opening, handling, moving, striking, and percussing of the said substance and substances and the containers thereof that the same then and there exploded with great force and violence, and then and there by means and force of the said explosion, broke down, wasted and destroyed divers, to wit, twenty thousand square feet of brick walls, being the walls of the said brick buildings and covered gateway hereinbefore described; ten thousand yards of plaster, one hundred windows, two hundred window-sashes, one hundred window-frames, one hundred window-casings, two thousand squares of glass, two thousand square feet of sashes, fifty door-frames, fifty door-cases, two thousand square yards ceiling, two thousand feet of gas-pipes, two thousand feet of water-pipe, two thousand square yards of wainscoting, five thousand square feet of floors, five chimneys, five water-closets, five hundred square yards of roof, one thousand floor-beams, one thousand roof-beams, one thousand rafters, ten thousand roof-boards, the whole of the said piazza or portico, and the rooms therein contained, five vaults, and the whole of the said banking fixtures: All being parcel of the freehold of the said premises, so held by them, the said defendants as such tenants as aforesaid, of great value, to
101 wit, of the value of twenty thousand dollars; and thereby greatly weakened, damaged, spoiled, ruined, and wasted the said premises so held by them of the said plaintiff as aforesaid, to the waste, destruction, and injury of the aforesaid reversionary estate of the plaintiff therein, whereby the said plaintiff was, and is greatly damaged and injured of and in his aforesaid estate of inheritance, of and in his aforesaid buildings, houses, and land with the appurtenances, and his said reversionary estate therein, against the form of the statute in such case made and provided, and to the damage of the said plaintiff of twenty thousand dollars.

II. And, for a further and separate cause of action, the plaintiff shows that he, the said plaintiff, at the time of the committing of the grievances hereinafter next mentioned, to wit, on the 16th day of April, 1866, and long before that time, was, and continually thenceforth hitherto has been, and still is seized in his demesne as of fee of the lot or parcel of land situate, lying, and being in the city and county aforesaid, and hereinbefore in the first count of this complaint described, together with the buildings thereon erected, and being the same in the first count of this complaint described, and that one Gerrit W. Bell was then and there the possessor and occupier of portion of the said buildings and premises, to wit, of the first or lower floor of the said iron building,
102 and of that of the said brick building, situate to the northward thereof, and called a furnace; and that a certain corporation called the Union Club of San Francisco, were then and there the possessors and occupiers of other portions of the said premises, to wit, of the whole thereof above the first or lower floor of all the said buildings and premises. And during all the said time the said Gerrit W. Bell and the said Union Club of San Francisco held the same respectively of the said plaintiff as his tenants of the several parts thereof, so possessed and

occupied by them respectively, from month to month, the reversion thereof all the said time remaining in him, the said plaintiff.

And the said defendants, whilst the said last-mentioned premises were so occupied and possessed by the said Gerrit W. Bell and by the said Union Club of San Francisco, as such tenants of the said plaintiff as aforesaid, they, the said defendants, trading and doing business as in the first count hereinabove alleged, then and there occupying premises in the immediate vicinity thereof, to wit, the premises hereinbefore in the first count of the complaint alleged to have been possessed and occupied by them, afterwards, to wit, on the 16th day of April, 1866, at the place aforesaid, then and there, by themselves and their servants, carelessly, negligently, and improvidently introduced, and caused and procured to be introduced, and suffered and permitted to be in-
103 troduced on, into, and upon the said adjoining premises so occupied by them as aforesaid, certain explosive substance and substances, and then and there, by themselves and their servants, so carelessly, negligently, unskilfully, improperly, and improvidently conducted themselves in and about the managing, keeping, opening, examining, handling, moving, striking, and percussing of the said substance and substances and the containers thereof, that the same then and there exploded with great force and violence, and then and there, by means and force of the said explosion, broke down, wasted, and destroyed divers, to wit, two thousand square feet of iron walls, five thousand square feet of plaster, five hundred windows, five hundred window-frames, five hundred window-casings, one thousand window-sashes, two hundred doors, two hundred door-frames, two hundred door-casings, five thousand square yards of floors, five thousand square yards of roof, five thousand square yards of brick wall, five thousand floor-beams, five thousand roof-beams, five thousand rafters, thirty sky-lights, five water-closets, two thousand feet of water-pipe, two thousand feet of gas-pipe, two thousand squares of glass, two thousand window-sashes, two thousand other sashes, five thousand square yards wainscoting, twenty chimneys, forty mantel-pieces, four dining-rooms, two kitchens,
104 two laundries, three offices, two billiard-rooms, four parlors, two reading-rooms, forty chambers, forty other rooms, forty pantries, forty closets, six pairs of stairs, ten halls, ten passages, one bridge, three cooking-ranges, three boilers, three furnaces, ten thousand solid feet of brick-work, all then and there, being parcel of the freehold of the said premises so possessed and held by the said Gerrit W. Bell and the said Union Club of San Francisco respectively, as such tenants of the said plaintiff respectively, of great value to wit, of the value of thirty thousand dollars, and thereby greatly weakened, damaged, spoiled, ruined, and wasted the said premises so held by the said Gerrit W. Bell and the said Union Club of San Francisco respectively, of the said plaintiff as aforesaid, whereby the same were rendered untenantable for a long space of time, to wit, for the space of six months next thereafter, in consequence whereof the same were surrendered and abandoned by the said tenants of the said plaintiff; and the plaintiff was, by reason of their said injured, ruined, and wasted condition, unable to rent the same out, or to obtain any rent or hire for the same as he otherwise could and would have done, to wit, for the aforesaid space of six months next ensuing the said explosion; by all which premises in this count mentioned the said plaintiff was greatly injured and damaged in his aforesaid reversionary estate of inheritance in the said premises so occupied and possessed by the said Gerrit W. Bell and the said Union Club of San Francisco in this count described,

105 and lost the rents, profits, and gains he would otherwise have received from the said premises, amounting to six thousand dollars, to the damage of the said plaintiff of thirty thousand dollars.

III. And, for a further and separate cause of action, the said plaintiff further shows:

That the said defendants, before and at the time of the committing of the grievances hereinafter next mentioned, to wit, on the 16th day of April, 1866, were lawfully in possession of a portion of the following described premises, namely: All that certain lot of land on the northwestern corner of California and Montgomery streets, in the city of San Francisco, with its front on the west side of Montgomery street, extending thereon sixty-five feet ten inches northwardly from the said corner of California street, and its southerly side extending along the north side of California street one hundred and thirty-seven feet six inches westwardly from Montgomery street, the most westwardly sixty-one feet six inches of said lot having a depth from California street northwardly of one hundred and thirty-seven feet and six inches, together with a granite building, three brick buildings, one iron building, and various other structures, erections, and fixtures thereon.

And that said defendants were so in possession of said portion of said premises, and held and occupied the same as tenants thereof to the plaintiff, to whom the immediate reversion thereof belonged un-

106 der a certain demise thereof theretofore made to the defendants, at and under a certain rent therefor, payable by the defendants to the plaintiff; and that a certain other portion of said premises was in the possession and occupation of one Gerrit W. Bell, who held the same as tenant of the plaintiff; and a certain other portion of said premises was in the possession and occupation of a certain corporation, known as the Union Club of San Francisco, which held the same as tenant of the plaintiff, to whom the immediate reversion, reversionary estate, and interest of, in, and to said last-mentioned portions of said premises, and of the entire premises above in this count described, likewise then and ever since belonged.

That the defendants, whilst the said first-mentioned portion of said premises was so in their possession and occupation as tenants thereof to the plaintiff, and whilst the immediate reversion, reversionary estate, and interest of, in, and to the whole of the said premises belonged to the plaintiff, did, by themselves and their servants, negligently and carelessly, and without proper precaution, bring and introduce, and cause and procured to be brought and introduced, and suffer and permit to be brought and introduced into and upon and within the said portion of said premises which was so in their possession and occupation as last aforesaid, a certain box or package containing some highly dangerous explosive substance, compound, or preparation, the composition of which

107 is to the plaintiff unknown, and whilst the said box or package so containing the said highly dangerous explosive substance, compound, or preparation aforesaid, was within and upon the last-mentioned portion of said premises, and in the charge and custody and under the control of the defendants, the said defendants, by themselves and their servants, so negligently and carelessly conducted themselves in respect to said box or package and the aforesaid substance, compound, or preparation therein contained, and so carelessly and negligently treated the same, and took so little and such bad care thereof, and so little precaution to prevent injury therefrom, that the said substance, compound, or preparation, exploded with great violence, and threw down, destroyed, damaged, and defaced various portions of the walls,

roofs, floors, partitions, ceilings, stairs, doors, windows, wainscoting, sky-lights, water closets, pipes, and other parts of the last-mentioned portion of said premises, and also of the aforesaid other portions of said premises of which the said Union Club of San Francisco and the said Gerrit W. Bell were severally in possession as aforesaid.

That, by reason of such throwing down, destruction, and damage, of and to said premises as aforesaid, the plaintiff was greatly damaged and injured in his reversion, reversionary estate, and interest in and to said premises, and the said portions of said premises of which
108 the said Gerrit W. Bell and the said Union Club were severally and respectively in possession, as aforesaid, were thereby rendered untenantable and unfit for and incapable of occupation, and were, in consequence thereof, vacated and surrendered and abandoned to the plaintiff, and so remained and continued for the period of six months or thereabouts, which period was necessarily occupied and consumed in repairing the same, and replacing them in a tenantable condition; and by reason of such surrender and abandonment, the plaintiff lost and was deprived of the rent of the said last-mentioned portion of said premises, which would otherwise have accrued to him and been received by him, from the said Union Club and the said Gerrit W. Bell, respectively, amounting to six thousand dollars, in gold coin of the United States.

Wherefore, and by reason of the premises in this count mentioned, the plaintiff sustained damages to the amount of fifty thousand dollars.

IV. And, for a further and separate cause of action, the said plaintiff further shows:

That the said defendant, before and at the time of committing of the grievances hereinafter next mentioned, to wit, on the 16th day of April, 1866, were lawfully in possession of a portion of the following described premises, namely: All that certain rectangu-
109 lar lot of land on the northwestern corner of California and Montgomery streets, in the city of San Francisco, with its front on the west side of Montgomery street, extending thereon sixty-five feet ten inches northwardly from the said corner of California street, and its southerly side extending along the north side of California street one hundred and thirty-seven feet six inches westwardly from Montgomery street, the most westwardly sixty-one feet six inches of said lot having a depth from California street northwardly of one hundred and thirty-seven feet and six inches, together with a certain building called a granite building, three brick buildings, one iron building, and various other structures, erections, and fixtures then and there erected and being thereon, that is to say, the said defendants were then and there in possession of the basement and first floor of the said building first above mentioned and called a granite building, together with certain vaults and banking fixtures therein contained, and a certain brick building called a warehouse, together with the right of way and free passage thereto through the back yard of the said premises, and certain water-closets, a certain covered gateway, and the first story
110 of a certain other brick building forty feet long by fifteen wide, all erected and then and there being in and upon the said lot of land.

And that said defendants were then and there so in possession of said portion of said premises, and held and occupied the same as tenants thereof to the plaintiff, to whom the immediate reversion thereof then and there belonged, under a certain demise thereof theretofore made to the defendants, at and under a certain rent therefor payable

by the defendants to the plaintiff; and that a certain other portion of said premises to wit, the first or lower floor of the said iron building and of a certain other brick building called a furnace then and there erected, and being in and upon the said lot of land, was and were then and there in the possession and occupation of one Gerrit W. Bell, who held the same as tenant of the plaintiff; and a certain other portion of said premises, to wit, the whole thereof above the first or lower floor of the said several buildings in this count mentioned, then and there erected, and being in and upon the said lot of land, was then and
111 there in the possession and occupation of a certain corporation known as the Union Club of San Francisco, which held the same as tenant of the plaintiff, to whom the immediate reversion, reversionary estate, and interest of, in, and to said last-mentioned portions of said premises, and of the entire premises above in this count described, likewise then and ever since belonged.

That the defendants, whilst the said first-mentioned portion of said premises was so in their possession and occupation as tenants thereof to the plaintiff as aforesaid, and whilst the immediate reversion, reversionary estate, and interest of, in, and to the whole of the said premises belonged to the plaintiff, did, by themselves and their servants, on the day and year last aforesaid, and at the place aforesaid, wrongfully and injuriously, with force and arms, bring and introduce and cause and procure to be brought and introduced, and suffer and permit to be brought and introduced into and upon and within the said portion of said premises, which was so in their possession and occupation as last aforesaid, a certain explosive substance, compound, or preparation, the composition and description of which are to the plaintiff un-
112 known, and whilst the said explosive substance, compound, or preparation was within and upon the last-mentioned portion of said premises, and in the charge and custody and under the control of the defendants, the said defendants, by themselves and their servants, then and there, with force and arms, wrongfully and injuriously caused the same to explode, with great violence, and then and there, by means and force of the said explosion thereof, broke, threw down, destroyed, damaged, and defaced and wasted various portions of the walls, roofs, floors, partitions, ceilings, stairs, doors, windows, wainscotting, skylights, water-closets, pipes, and other parts of the last-mentioned portion of said premises, and also of the aforesaid other portions of said premises, of which the said Union Club of San Francisco and the said Gerrit W. Bell were severally in possession as aforesaid, that is to say: two thousand square feet of iron walls, five thousand square feet of plaster, five hundred windows, five hundred window-frames, five hundred window-casings, one thousand window-sashes, two hundred doors, two hundred door-frames, two hundred door-casings, five thousand square yards of floor, five thousand square yards of roof, five
113 thousand square yards of brick wall, five thousand floor-beams, five thousand roof-beams, five thousand rafters, thirty sky-lights, five water-closets, two thousand feet of water-pipe, two thousand feet of gas-pipe, two thousand squares of glass, two thousand window-sashes, two thousand other sashes, five thousand square yards wainscoting, twenty chimneys, forty mantel-pieces, four dining-rooms, two kitchens, two laundries, three offices, two billiard-rooms, four parlors, two reading-rooms, forty chambers, forty other rooms, forty pantries, forty closets, six pairs of stairs, ten halls, ten passages, one bridge, three cooking-ranges, three boilers, three furnaces, ten thousand solid feet of brick work, all then and there being parcel of the freehold of

the said premises, so possessed and held by them the said defendants, and by the said Gerrit W. Bell and the said Union Club of San Francisco, respectively, as such tenants of the said plaintiff, respectively, of great value, to wit, of the value of thirty thousand dollars, and thereby greatly weakened, damaged, spoiled, ruined, and wasted the said premises so held by them, the said defendants, and by the said Gerrit W. Bell and the said Union Club of San Francisco, respectively, of the said plaintiff as aforesaid.

114 That, by reason of such throwing down, waste, destruction, and damage of and to said premises as aforesaid, the plaintiff was greatly damaged and injured in his reversion, reversionary estate, and interest in and to said premises, and the said portions of said premises of which the said Gerrit W. Bell and the said Union Club were severally and respectively in possession as aforesaid, were thereby rendered untenantable and unfit for and incapable of occupation, and were, in consequence thereof, vacated, surrendered, and abandoned to the plaintiff, and so remained and continued for the period of six months, or thereabouts, which period was necessarily occupied and consumed in repairing the same, and replacing them in a tenantable condition; and, by reason of such surrender and abandonment, the plaintiff lost and was deprived of the rent of the said last-mentioned portions of said premises, which would otherwise have accrued to him and been received by him from the said Union Club and the said Gerrit W. Bell, respectively, amounting to six thousand dollars, in gold coin of the United States.

Wherefore, and by reason of the premises in this count men-
115 tioned, the said plaintiff sustained damages to the amount of seventy-five thousand dollars.

And the plaintiff therefore asks judgment against the said defendants for treble the damages sustained by him, by reason of the waste in the first count or cause of action hereinbefore set forth, amounting to sixty thousand dollars, and also for the other damages by him sustained by reason of the other matters hereinabove set forth, amounting in all to one hundred thousand dollars, besides costs.

San Francisco, November 23, 1869.

DOYLE & BARBER,
Att'ys for Pl'ffs.

(Endorsed:) Filed November 23, 1869. Geo. E. Whitney, cl'k. By A. D. Grimwood, D. C.

Service of a copy of the within is hereby admitted this 23d day of November, at San Francisco.

WILSON & CRITTENDEN.

116 *Amended answer, by leave of the court, to amended complaint.*

In the circuit court of the United States for the district of California, ninth district.

JOHN PARROTT
v.
D. N. BARNEY, HENRY WELLS, THOMAS M. Janes, William G. Fargo, Louis McLane, and James McKay, trading under the firm of Wells, Fargo & Co. } Amended answer.

The defendants in this action, the said D. N. Barney, Henry Wells,

Thomas M. Janes, William G. Fargo, Louis McLane, and James McKay, answer the complaint of the plaintiff herein, said John Parrott, as follows:

I. For answer to the said complaint they deny each and every allegation in said complaint contained.

II. For answer to the first count of said complaint they deny each and every allegation of said count.

117 III. For a further and separate answer to the said first count they deny that, at the said several times, or any of them, or at the place in said count, or in the said complaint mentioned, they, the said defendants, or any of them, were copartners, trading or doing business under the firm-name of Wells, Fargo & Co., or any other name.

They further deny that, on the said 16th of April, 1866, or at any time before the commencement of this action, the said plaintiff was seized in fee, or otherwise, of said certain lot of land in the city and county of San Francisco, at the northwesterly corner of Montgomery and California streets in said city and county, and bounded and described as in said first count set forth, or any part thereof, or of the buildings thereon erected, as in the said first count alleged, or any of them, as in said first count described; or that there were at any time prior to the commencement of this action such buildings, or any of them, on said lot of land.

And the said defendants further deny that they, or any of them, were then and there trading and doing business as aforesaid, or were the possessors or occupiers of a portion of the said premises, as in the first count described, or of any part thereof, or of the appurtenances

118 thereunto belonging, or any of them, as in said first count described; or that, during all the said time, or during any time they, or any of them, held the same, or any part thereof, of the said plaintiff, as his tenants from year to year, or at or under "certain yearly rent, to wit, the yearly rent of twelve thousand ($12,000) dollars," or any other rent, or as tenants of the plaintiff in any manner otherwise; or that the reversion thereof was during all the said time, or for any time, remaining in him, the said plaintiff.

And the defendants further deny that, while they occupied or possessed the same, or any part thereof, as such tenants as aforesaid, (or that they ever did so occupy or possess the same,) they, or any of them, did, on the said 16th day of April, 1866, or at any other time before the commencement of this action, by themselves or their servants, or in any manner otherwise, carelessly, negligently, improperly, or improvidently, or in any manner otherwise, introduce, or cause or procure to be introduced, or suffer or permit to be introduced, in the said or any portion of the said premises so untruly alleged to have been occupied by them as aforesaid, certain or any explosive substance or substances; or that

119 they or any of them did then and there, or otherwise, by themselves or their servants, or in any manner otherwise, so carelessly, negligently, improperly, or improvidently conduct themselves in or about the managing, keeping, exam'ing, opening, handling, moving, striking, or percussing of the said alleged substance or substances, or the containers thereof, that the same, or any of them exploded with great force, or any force or violence, or then and there, by means or force of the said explosion, or otherwise, broke down, wasted, or destroyed the several articles of property in said first count fully described and alleged to have been parcel of the freehold of the said premises, or any part thereof; or that the same were of the value of *of* twenty thousand ($20,000) dollars, or any less sum; or that they, or any of them, thereby, or otherwise, greatly or at all, weakened, damaged, spoiled, ruined, or

wasted said premises untruly alleged to have been so held by them of the said plaintiff, or any part thereof, to the waste, destruction, or injury of the alleged revisionary or other estate of the said plaintiff therein; or that the plaintiff was or is thereby greatly or at all damaged or injured of or in his alleged estate of inheritance, of or in his alleged buildings, houses or land, with the appurtenances, or any
120 part thereof, or his alleged reversionary estate therein, against the form of the statute in such case made and provided, or to the damage to the plaintiff in twenty thousand ($20,000) dollars, or any less sum.

IV. And the said defendants, for answer to the second count of the said complaint, deny each and every allegation of the said second count respecting the same.

V. And for a further and separate answer to the said second count, the said defendants deny that, on the said 16th day of April, 1866, or at any time before the commencement of this action, said plaintiff was, or still is, seized, in fee or otherwise, of the lot or parcel of land in the city and county, and in the said first count of the said complaint described, or any part thereof, or of the buildings thereon erected, being the same in the first count described, or any part thereof; or that one Gerrit W. Bell, or any other person, was then and there the possessor or occupier of a portion of said buildings and premises,
121 namely, of the first floor of the said iron building, and of that of the said brick building situate to the northward thereof, and called the "furnace," or of any portion of the said buildings or premises; or that a certain corporation called the Union Club of San Francisco, or any other person or persons, were then and there the possessors or occupiers of another portion of the said premises, namely, of the whole thereof, above the first or lower floor of all the said buildings and premises, or of any portion of said buildings or premises.

And they further deny that, during the said time, or any part thereof, the said Bell or the said Union Club of San Francisco held the same, respectively, or any part thereof of the said plaintiff as his tenants, or that the same, or any part thereof, were possessed or occupied by them, or either of them, as such tenants from month to month, or in any manner otherwise, or that the reversion of the same, or of any part thereof, was, at any time, remaining in him, the said plaintiff.

And they further deny that while, as untruly alleged by the plaintiff, the said last-mentioned premises were so occupied or possessed
122 by the said Bell or by the said Union Club as such tenants of plaintiff, (or that they ever were so occupied or possessed,) or while they, the said defendants, or any of them, were, as untruly alleged by the plaintiff, trading or doing business as in the said first count alleged, or that they ever were so trading or doing business, or that they were then and there, or otherwise, occupying premises in the immediate or any vicinity thereof, namely, the said premises in the said first count untruly alleged to have been possessed or occupied by them, did, or any of them, afterwards, on April 16, 1866, at the place aforesaid, or at any other time or place, by themselves or their servants, or otherwise, carelessly, negligently, or improvidently introduce, or cause or procure to be introduced, or suffer or permit to be introduced on, into, or upon the said adjoining premises, so as untruly alleged by the plaintiff, occupied by them, certain or any explosive substance or substances, or did, by themselves or their servants, so carelessly, negligently, unskilfully, improperly, or improvidently conduct themselves in or about the managing, keeping, opening, examining, handling, moving, striking, or percussing of

the said substance or substances, or the containers thereof, that the same, or any part thereof, then and there exploded with great or any
123 force or violence, or then and there, by means and force of the said explosion or otherwise, broke down, wasted, or destroyed divers articles of property, in said second count fully described and alleged to be then and there, parcel of the freehold of the said premises, untruly alleged as possessed and held by the said Bell and the said Union Club of San Francisco, respectively, as such tenants of plaintiff, or any portion of such property, or that the same were of the value of thirty thousand ($30,000) dollars, or any less sum of money, or thereby greatly or at all weakened, damaged, spoiled, ruined, or wasted said premises, or any part of them, untruly alleged in the said count to have been so held by the said Bell and the said Union Club of San Francisco of the said plaintiff as aforesaid, or that the same were rendered untenantable for the space of six (6) months next thereafter, or for any time whatever, or in any manner whatever, or that the same, or any part thereof, were surrendered or abandoned by the said alleged tenants of the plaintiff, or any of them, or that the plaintiff was, for the reason in said second count alleged or otherwise, unable to rent the same, or to obtain any rent or hire for the same for the said six
124 months next ensuing said alleged explosion, or for any time whatever.

They further deny that, by reason of the premises in said second count mentioned, or any of them, the said plaintiff was greatly, or at all, injured or damaged in his alleged reversionary estate of inheritance in the said premises, untruly alleged to have been so occupied and possessed by the said Bell and the said Union Club of San Francisco, or that the loss of rents, profits, or gains which, as alleged, he would have received from the said premises amounted to six thousand ($6,000) dollars, or any less sum, or that the said plaintiff would have received from said premises any rents, profits, or gains, in any sum whatever.

They further deny that the said plaintiff was damaged in thirty thousand ($30,000) dollars, or any less sum.

VI. The said defendants, answering the third count of the said complaint, deny each and every allegation in the said count contained.

125 VII. And, for a further answer to the said third count, the said defendants deny that, on April 16th, 1866, or at any time before the commencement of this action, they, or any of them, were lawfully or otherwise in possession of any portion of the premises described in the said third count, or of any of the buildings, structures, erections, or fixtures alleged and described as being thereon, or that any such building or buildings, structures, erections, or fixtures, or any of them, were thereon, or that they, the defendants, or any of them, were in possession of such portion of said premises, or held or occupied the same as tenants of the plaintiff under a certain demise theretofore made to the said defendants, at or under a certain rent therefor, or in any manner as tenants of the said plaintiff, or that the immediate or any reversion thereof belonged to the said plaintiff. And they deny that a certain other portion, or any portion of said premises, was in the possession or occupation of said Gerrit W. Bell, or that he held the same as tenant of the plaintiff, or otherwise, or that a certain other or any portion of said premises was in the possession or occupation of said corporation known as the Union Club of San Francisco, or
126 that said corporation held the same as tenant of the plaintiff in any manner whatever, or that the immediate or any reversion,

reversionary estate, or interest of, in, or to said last-mentioned portions of said premises, or any of them, or all of the entire premises in said count described, or any portion thereof, did then, or at any time before the commencement of this action belong to the plaintiff.

The said defendants further deny that, during the period of their possession or occupation of said described portion of said premises, as untruly alleged in said third count, or at any time before the commencement of this action, they, or any of them, by themselves or their servants, or otherwise, did, negligently or carelessly or without proper precaution, bring or intoduce, or cause or procure to be brought or introduced, or suffered or permitted to be brought or introduced into or upon or within the said or any portion of said premises, untruly alleged to have been in their possession and occupation, a certain or any box or package containing some highly or at all dangerous explosive substance, com-
127 pound, or preparation; or that while the said box or package so containing such substance, compound, or preparation so within, or upon the said or any portion of said premises, or in the charge, custody, or control of the defendants, or any of them, or that the same was upon said premises or any part thereof or in the charge, custody, or control of the defendants or any of them; or that the said defendants or any of them did, by themselves or their servants, so negligently or carelessly, or otherwise, conduct themselves in respect to said box or package, or the aforesaid substance, compound, or preparation therein contained, or so carelessly or negligently treat the same, or take so little or such bad care thereof, or so little precaution to prevent injury therefrom, that the said substance, compound, or preparation exploded with great or any violence or threw down, destroyed, damaged, or displaced various or any portions of the walls, roofs, floors, partitions, ceilings, stairs, doors, windows, wainscoting, sky-lights, water-closets, pipes, or any of them, or the other parts or any of them, of the said last-mentioned portion of said premises, or of the aforesaid other portions of said premises, of which the said Union Club of San Francisco and the said
128 Bell were, as alleged, in possession, or of any portion of said premises whatever.

They further deny that, by reason of such alleged throwing down, destruction, or damage of or to said premises, or otherwise, the plaintiff was greatly or at all damaged or injured in his reversion, reversionary estate, or interest in or to said premises or the said portions of said premises of which, as untruly alleged, the said Bell and the said Union Club were in possession as aforesaid; or that the said plaintiff ever had any reversion, reversionary estate, or interest in or to said premises or any part thereof; or that the said portions of said premises were thereby rendered untenantable and unfit, wholly or partly for, or incapable of, occupation, or, in consequence thereof, vacated or surrendered or abandoned to the plaintiff, and so remained or continued for the period of six (6) months or thereabouts, or any period whatever; or that said period or any period was, necessarily or in fact, occupied or consumed in repairing the same or replacing them in a tenantable condition; or that, by reason of such alleged surrender or abandonment, the plaintiff lost or was deprived of the rent of said portions of said premises, or
129 of any part thereof, or that said rent would otherwise have accrued to him or been received by him from the said Union Club and the said Gerrit W. Bell, respectively, or either of them; or that such rent amounted to six thousand ($6,000) dollars, in gold coin of the United States, or any less sum.

They further deny that, thereby or by reason of the premises in said

third count mentioned, the said plaintiff sustained damages to the amount of fifty thousand ($50,000) dollars, or in any less sum.

VIII. And for a further and separate answer to the said complaint and the whole thereof the said defendants allege as follows:

That, on said 16th day of April, 1866, and long previous thereto, they, the said defendants, were and had been carrying on in said city of San Francisco a general banking and express business, under the name and style of Wells, Fargo & Co.

That their said express business, which was then and there very extensive, was of the usual character and description of such business as known and carried on in the United States, and consisted of the
130 receiving, carrying, forwarding, and delivering, for hire, by land or water, in and out of the said State of California, the goods and chattels of others of every description—said goods and chattels being almost universally contained in close boxes, cases, or packages.

That, on said 16th day of April, 1866, the defendants were, and long before had been, in the use and occupation of certain premises in said city of San Francisco, being the same fully described in the first count of said complaint, as a portion of certain premises, and were so in the use and occupation thereof, in and for the purposes of their said express business, as tenants of the plaintiff, from year to year, holding over and under an indenture of lease, wherein and whereby it was, among other things, agreed and provided, by and between the said plaintiff and the said defendants, that the said premises should be used by the said defendants in and for their business and calling as banking and express offices, subject only to the exception that the defendants should not receive into said premises, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility; and also, that, at the expiration of the said tenancy of the defendants
131 they would quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof would permit, damages by the elements excepted.

That, at and before the commencement of said tenancy, from year to year, and during the same, the said plaintiff had full actual notice of the nature and character of the said express business of the defendants and was well acquainted therewith.

That, on said 16th day of April, 1866, the said defendants, so being such tenants, from year to year, of the plaintiff, did, in the usual course of their said express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, receive into and upon the said premises so occupied and used by them in and for their express business, a certain close wooden box or package, which had been carried by sea from New York to said San Francisco, by way of the Isthmus of Panama, and was so delivered to them in their express business for transhipment and forwarding to a point in the interior of the said State of California, the same showing then and
132 there, on the outside, signs of leakage. And while they, the said defendants, then and there in the like manner, in the usual course of their express business and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, were handling and moving the same, or opening or proceeding to open the same for the purpose of ascertaining and stopping the said leakage, the contents of said box or package did, without any fault of theirs, explode with great force and violence, and such explosion then and there

broke, injured, and destroyed certain portions of the entire premises in the said complaint described, including that portion of said premises used and occupied by the defendants, namely, certain portions of the walls, roofs, floors, ceilings, stairs, doors, windows and other parts of the said buildings and premises; which are the same wrongs and injuries by the said plaintiff herein complained of. But the said defendants deny that, by reason of the premises, the said plaintiff was damaged in the sum of one hundred thousand ($100,000) dollars in the said complaint set forth, or in any less sum.

The said defendants further allege that the said box or package
133 was without any exterior marks or signs to indicate its contents, or the nature thereof, and the said contents were wholly unknown to them or any of them, nor had they or any of them, any notice thereof, express or implied, or of their character or nature; and the same were not gunpowder, or alcohol, or any other article dangerous from its combustibility, but were a certain new substance or preparation or composition wholly unknown to the defendants, or any of them, and also unknown in commerce, and then and there introduced for the first time into said State of California. That said substance, or preparation, or composition is known as nitro-glycerine, and is not combustible, nor dangerous from combustibility, nor explosive by fire, but is, and then and there was, highly explosive from or by percussion or concussion in the course of moving or handling or of opening or attempting to open the box or package containing the same, or spontaneously, and without any such concussion or percussion.

And, except as aforesaid in this further and separate answer set forth, they, the said defendants, deny each and every allegation of the said complaint, and of each count thereof.

IX. And, for a further and separate answer to the 1st and 3rd
134 counts of the said complaint, the said defendants allege as follows:

That, on said 16th day of April, 1866, and long previous thereto, they, the said defendants, were and had been carrying on in said city of San Francisco a general banking and express business under the name and style of Wells, Fargo & Co.

That their said express business, which was then and there very extensive, was of the usual character and description of such business, as known and carried on in the United States, and consisted of the receiving, carrying, forwarding, and delivering for hire, by land or water, in and out of said State of California, the goods and chattels of others of every description, said goods and chattels being almost universally contained in close boxes, cases, or packages.

That, on said 16th day of April, 1866, the defendants were, and long before had been, in the use and occupation of certain premises in said city of San Francisco, being the same fully described in the first count of said complaint as a portion of certain premises, and were so in the use and occupation thereof, in and for the purposes of their said express business, as tenants of the plaintiff, holding over, under
135 an indenture of lease, wherein and whereby it was, among other things, agreed and provided, by and between the said plaintiff and the said defendants, that the said premises should be used by the said defendants in and for their business and calling as banking and express offices, subject only to the exception that the defendants should not receive into said premises, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility; and also that, at the expiration of said tenancy of the defendants, they would quit and surrender the said demised premises, with all

fixtures therein contained, in as good condition as the reasonable use and wear thereof would permit, damages by the elements excepted.

That, at and before the commencement of said tenancy and during the same, the said plaintiff had full actual notice of the nature and character of the said express business of the defendants, and was well acquainted therewith.

That, on said 16th day of April, 1866, the said defendants, so being such tenants of the plaintiff, did, in the usual course of their said express business, and in the exercise of due care and diligence, and
136 without any negligence, bad care, or want of care on their part, receive into and upon the said premises so occupied and used by them in and for their express business, a certain close wooden box or package, which had been carried by sea from New York to San Francisco by way of the Isthmus of Panama, and was so delivered to them in their express business for transhipment and forwarding to a point in the interior of the said State of California; the same showing then and there on the outside signs of leakage; and while they, the said defendants, then and there in the like manner, in the usual course of their express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, were causing the same to be examined to ascertain its contents and any injury to the same, the contents of said box or package did, without any fault of theirs, explode with great force and violence, and such explosion then and there broke, injured, and destroyed certain portions of the entire premises in said complaint described, including that portion of said premises used and occupied by the defendants, namely, certain portions of the walls, roofs, floors, ceilings, stairs, doors, win-
137 dows, and other parts of the said buildings and premises, which are the same wrongs and injuries by the said plaintiff herein complained of. But the said defendants deny that, by reason of the premises, the said plaintiff was damaged in the sum of one hundred thousand ($100,000,) dollars as in the said complaint set forth, or in any less sum.

The said defendants further allege that the said box or package was without any exterior marks or signs to indicate its contents or the nature thereof, and the said contents were wholly unknown to them, or any of them, nor had they or any of them notice thereof, express or implied, or of their character or nature; and the same were not gun-powder or alcohol, or any other article dangerous from its combustibility, but were a certain new substance or preparation or composition, wholly unknown to the defendants, or any of them, and also unknown in commerce, and then and there introduced for the first time into said State of California.

That said substance or preparation or composition is known as nitroglycerine, and is not combustible nor dangerous from combustibility, nor explosive by fire, but is, and then and there was highly explosive from or by percussion or concussion, in the course of moving or hand-
138 ling, or of opening or attempting to open the box or package containing the same, or spontaneously, and without any such concussion or percussion.

And the defendants aver that, after the happening of the said injury aforesaid, caused by the said explosion, and before the expiration of said demise by the plaintiff to these defendants, that is to say, between said 16th day of April, 1866, and the 31st day of December, 1866, and long before the commencement of this action, the said defendants, at their own cost and expense, and by the consent, concurrence, and approbation of said plaintiff, caused the said premises so leased and de-

mised to the defendants, and so occupied by them, with all the fixtures therein contained, to be repaired, restored, and put in as good, and in fact better, condition than the same were before the happening of said explosion and injury, to the cost of the defendants of about or near ten thousand dollars; and the same has thence hitherto remained so fully repaired and in such good condition.

And, except as aforesaid in this amended answer set forth, they, the defendants, deny each and every allegation in the first and third counts of the said complaint.

139 X. The said defendants, answering the fourth count of the amended complaint, deny each and every allegation in the said count contained.

XI. And, for a further answer to said fourth count, the said defendants deny that, on April 16th, 1866, or at any time before the commencement of this action, they, or any of them, were lawfully or otherwise in possession of any portion of the premises described in the said fourth count, or any of the buildings, structures, erections, or fixtures alleged and dsscribed as being thereon, or that any such building or buildings, structures, erections, or fixtures, or any of them, were thereon, or that they, the defendants, or any of them, were then or there, or at any time, or otherwise, in possession of such portion of said premises, or held or occupied the same as tenants of the plaintiff under a certain demise theretofore made to the said defendants, at or under a certain rent therefor, or in any manner as tenants of the said plaintiff, or that the immediate or any reversion thereof belonged to the said plaintiff. And they deny that a certain other portion,

140 or any portion, of said premises was in the possession or occupation of said Gerrit W. Bell, or that he held the same as tenant of the plaintiff or otherwise; or that a certain other or any portion of said premises was in the possession or occupation of said corporation known as the Union Club of San Francisco, or that said corporation held the same as tenant of the plaintiff in any manner whatever, or that the immediate or any reversion, reversionary estate, or interest of, in, or to said last-mentioned portions of said premises, or any of them, or all of the entire premises in said count described, or any portion thereof, did then, or at any time before the commencement of this action, belong to the plaintiff.

And the said defendants further deny that, during the period of their possession or occupation of said described portion of said premises, as untruly alleged in said fourth count, or at any time before the commencement of this action, they or any of them, by themselves or their servants, or otherwise, on the day and year last aforesaid, or at any other time, or at the place aforesaid, wrongfully or injuriously, or with force or arms, or otherwise, did bring or introduce, or cause or procure to be brought or introduced, or suffered or permitted to be brought

141 or introduced into or upon or within the said or any portion of said premises, untruly alleged to have been in their possession and occupation, a certain or any explosive substance, compound, or preparation, or that while the said explosive substance, compound, or preparation so within or upon the said or any portion of said premises, or in the charge, custody, or control of the defendants, or any of them, or that the same was upon said premises, or any part thereof, or in the charge, custody, or control of the defendants, or any of them, or that the said defendants, or any of them, did, by themselves or their servants, then or there, or at any other time, or otherwise, with force or arms, or wrongfully or injuriously, or otherwise, cause the same to ex-

plode with great or any violence, or that, by means or force of the said explosion thereof, or otherwise, broke, threw down, destroyed, damaged, or displaced various or any portions of the walls, roofs, floors, partitions, ceilings, stairs, doors, windows, wainscoting, sky-lights, water-closets, pipes, or any of them, or the other parts, or any of them, of the said last-mentioned portion of said premises, or of the aforesaid other portions of said premises, of which the said Union Club of San
142 Francisco and the said Bell were, as alleged, in possession, or of any portion of said premises whatever mentioned and described in said fourth count of said amended complaint.

They further deny, that by reason of such alleged throwing down, waste, destruction or damage of, or to said premises, or otherwise, the plaintiff was greatly, or at all damaged or injured in his reversion, reversionary estate, or interest in or to said premises, of which, as untruly alleged, the said Bell and the Union Club were in possession as aforesaid; or, that the said plaintiff ever had any reversion, or reversionary estate, or interest in or to said premises or any part thereof; or that the said portions of said premises were thereby rendered untenantable, and unfit wholly or partly for, or incapable of occupation, or in consequence thereof vacated or surrendered or abandoned to the plaintiff and so remained or continued for the period of six (6) months, or thereabouts, or any period whatever or that period or any period was, necessarily or in fact, occupied or consumed in repairing the same or replacing them in a tenantable condition; or that by reason of such alleged surrender or abandonment the plaintiff lost or was deprived of the rent of said
143 portions of said premises, or of any part thereof, or that said rent would otherwise have accrued to him or been received by him from the said Union Club and the said Gerrit W. Bell respectively, or either of them; or that such rent amounted to six thousand dollars, in gold coin of the United States, or any less sum.

They further deny that thereby or by reason of the premises in said fourth count mentioned, the said plaintiff sustained damages to the amount of seventy-five thousand dollars, or any less sum.

XII. And for a further and separate answer to the fourth count of the said amended complaint, the said defendants allege as follows:

That, on said 16th day of April, 1866, and long previous thereto, they, the said defendants, were and had been carrying on in said city of San Francisco a general banking and express business, under the name and style of Wells, Fargo & Co.

That their said express business which was then and there very extensive, was of the usual character and description of such business as known and carried on in the United States and consisted of the
144 receiving, carrying, forwarding, and delivering, for hire, by land or water, in and out of said State of California, the goods and chattels of others of every description, said goods and chattels being almost universally contained in close boxes, cases, or packages.

That, on said 16th day of April, 1866, the defendants were, and long before had been in the use and occupation of certain premises in said city of San Francisco, being the same fully described in the fourth count of said amended complaint, as a portion of certain premises; and were so in the use and occupation thereof, in and for the purposes of their said express business, as tenants of the plaintiff, holding over, under an indenture of lease, a copy of which is hereunto annexed, marked Exhibit "A," and made part hereof; wherein and whereby it was, among other things, agreed and provided, by and between the said plaintiff and the said defendants, that the said premises should be used

by the said defendants in and for their business and calling as banking and express offices, subject only to the exception, that the defendants should not receive into said premises or allow any person to place
145 therein, gunpowder, alcohol, or any other articles, dangerous from their combustibility; and also, that, at the expiration of said tenancy of the defendants they would quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof would permit, damages by the elements excepted.

That, at and before the commencement of said tenancy and during the same, the said plaintiff had full actual notice of the nature and character of the said express business of the defendants, and was well acquainted therewith.

That, on the said 16th day of April, 1866, the said defendants so being such tenants of the plaintiff, did, in the usual course of their said express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, receive into and upon the said premises so occupied and used by them in and for their express business, a certain close wooden box or package, which had been carried by sea from New York to San Francisco by way of the Isthmus of Panama, and was so delivered to them in their express business of trans'hipment and forwarding to a point in the interior
146 of the said State of California, the same showing then and there on the outside thereof signs of leakage; and while they, the said defendants, then and there in the like manner, in the usual course of their express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, were causing the same to be examined to ascertain its contents, and any injury to the same, the contents of said box or package did, without any fault of theirs, explode with great force and violence, and such explosion then and there broke, injured, and destroyed certain portions of the entire premises in said amended complaint described, including that portion of said premises used and occupied by the defendants, namely, certain portions of the walls, roofs, floors, ceilings, stairs, doors, windows and other parts of the said buildings and premises, which are the same wrongs and injuries by the said plaintiff herein complained of. But the said defendants deny that by reason of the premises the said plaintiff was damaged in the sum of one hundred thousand ($100,000) dollars, as in the said amended complaint set forth, or in any less sum.

The said defendants further allege that the said box or package
147 was without any exterior marks or signs to indicate its contents, or the nature thereof, and the said contents were wholly unknown to them, or any of them, nor had they, or any of them, notice thereof, express or implied, or of their character or nature; and the same were not gunpowder or alcohol, or any other article dangerous from its combustibility, but were a certain new substance or preparation or composition, wholly unknown to the defendants, or any of them, and also unknown in commerce, and then and there introduced for the first time into the State of California.

That said substance or preparation, or composition is known as nitroglycerine, and is not combustible, nor dangerous from combustibility, nor explosive by fire, but is, and then and there was, highly explosive from or by percussion or concussion in the course of moving or handling or of opening or attempting to open the box or package containing the same, or spontaneously and without any such concussion or percussion.

And the defendants aver, that, after the happening of the said injury

aforesaid, caused by the said explosion, that is to say, between said 16th day of April, 1866, and the 31st day of December, 1866, and
148 long before the commencement of this action, the said defendants, at their own cost and expense, and by the consent, concurrence and approbation of said plaintiff, caused the said premises, with all the fixtures therein contained, to be repaired, restored, and put in as good, and in fact, in better condition, than the same were before the happening of said explosion and injury, to the cost of the defendants of about or near ten thousand dollars, and the same has thence hitherto remained so fully repaired, and in such good condition.

And, except as aforesaid in this amended answer set forth, they, the defendants, deny each and every allegation of the said fourth count of said amended complaint.

XIII. And, for a further and separate answer to the said amended complaint, and to the whole thereof, the said defendants allege as follows:

That, on said 16th day of April, 1866, and long previous thereto, they, the defendants, were and had been carrying on in said city of San Francisco, a general banking and express business, under the
149 name and style of Wells, Fargo & Co.

That their said express business, which was then and there very extensive, was of the usual character, and description of such business, as known and carried on in the United States, and consisted of the receiving, carrying, forwarding, and delivering for hire, by land or water, in and out of the said State of California, the goods and chattels of others, of every description, said goods and chattels being, almost universally, contained in close wooden boxes, cases, or packages.

That, on said 16th day of April, 1866, the defendants were, and long before had been, in the use and occupation of certain premises in said city of San Francisco, being the same fully described in the first count of said amended complaint as a portion of certain premises, and were so in the use and occupation thereof in and for the purposes of their said express business as tenants of the plaintiff, holding over, under lease, a copy of which is hereunto annexed, marked "Exhibit A," and made part hereof, wherein and whereby it was, among other things, agreed and provided, by and between the said plaintiff and the said defendants, that the
150 said premises should be used by the said defendants in and for their business and calling as banking and express offices, subject only to the exception that the defendants should not receive into said premises, or allow any person to place therein gunpowder, alcohol, or any other articles dangerous from their combustibility; and also, that, at the expiration of the said tenancy of the defendants, they would quit and surrender the said demised premises with all fixtures therein contained in as good condition as the reasonable use and wear thereof would permit, damages by the elements excepted.

That, at and before the commencement of said tenancy, and during the same, the said plaintiff had full actual notice of the nature and character of the said express business of the defendants, and was well acquainted therewith.

That, on said 16th day of April, 1866, the said defendants, so being such tenants of the plaintiff, did, in the usual course of their said express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, receive into and upon the said premises so occupied and used by them in and for
151 their express business, a certain close wooden box or package, which had been carried by sea from New York to said San Fran-

cisco by way of the Isthmus of Panama, and was so delivered to them, in their express business, for trans'hipment and forwarding to a point in the interior of the said State of California, the same showing, then and there, on the outside, signs of leakage; and while they, the said defendants, then and there, in the like manner in the usual course of their express business, and in the exercise of due care and diligence, and without any negligence, bad care, or want of care on their part, were proceeding to open the same for the purpose of ascertaining and stopping the said leakage, the contents of said box or package did, without any fault of theirs, explode with great force and violence, and such explosion then and there broke, injured, and destroyed certain portions of the entire premises in the said amended complaint described, including that portion of said premises used and occupied by the defendants, namely, certain portions of the walls, roofs, floors, ceilings, stairs, doors, windows, and other parts of the said buildings and premises, which are the same wrongs and injuries by the said plaintiff herein complained of.

152 But the said defendants deny that, by reason of the premises, the plaintiff was damaged in the sum of one hundred thousand ($100,000) dollars, as in the said amended complaint set forth, or in any less sum.

The said defendants further allege that the said box or package was without any exterior marks or signs to indicate its contents or the nature thereof; and the said contents were wholly unknown to them or any of them, nor had they or any of them, any notice thereof, express or implied, of their character or nature; and the same were not gunpowder, or alcohol, or any other article dangerous from its combustibility, but were a certain new substance or preparation or composition, wholly unknown to the defendants or any of them, and also unknown in commerce, and then and there introduced for the first time into said State of California; that said substance, or preparation, or composition is known as nitro glycerine, and is not combustible nor dangerous from combustibility, nor explosive by fire, but is, and then and there was, highly explosive from and by percussion or concussion, in the course of moving or handling, or of opening or attempting to open the box

153 or package containing the same, or spontaneously, and without any such concussion or percussion.

And, except as aforesaid in this further and separate answer set forth, they, the said defendants deny each and every allegation of the said amended complaint and of each count thereof.

XIV. And the defendants aver that, after the happening of the said injury aforesaid, caused by the said explosion, that is to say, between said 16th day of April, 1866, and the 31st day of December, 1866, and long before the commencement of this action, the said defendants, at their own cost and expense, and by the consent, concurrence, and approbation of said plaintiff, caused the said premises, with all the fixtures therein contained, to be repaired, restored, and put in as good, and, in fact, better condition than the same were before the happening of said explosion and injury, to the cost of the defendants of about or near ten thousand dollars; and the same has thence hitherto remained so fully repaired and in such good condition.

And, except as aforesaid, in this amended answer set forth, they, the defendants deny each and every allegation in said amended complaint contained.

WILSON & CRITTENDEN,
Att'ys for Defendants.

154 "EXHIBIT A."

This indenture entered into this seventh day of November, in the year one thousand eight hundred and fifty-five, between John Parrott, of San Francisco, and State of California, of the first part, and Henry Wells, William G. Fargo, D. N. Barney, and James McKay, of the city and State of New York, and T. M. Janes, of the aforesaid city and State, but at present residing in the city of San Francisco and State of California, and others, partners, carrying on a banking and express business in the said city of San Francisco, under the name and style of Wells, Fargo & Co., of the second part, witnesseth:

That the said party of the first part for and in consideration of the covenants and agreements hereinafter contained, which are to be kept and performed by the said parties of the second part, hath demised and let, and doth hereby demise and let, unto the said parties of the second part, the basement and first floor contained in that certain granite building situate in the city of San Francisco, on the northwest corner of California and Montgomery streets, together with the use of a
155 brick ware-house in the rear, thirty by sixty feet, and the right of way and free passage thereto through the back-yard of said premises, and all appurtenances thereunto belonging, for the full term of two years, commencing on the first day of January, 1856, to the 31st day of December, 1857, at the yearly rent of twelve thousand dollars, payable in monthly instalments of one thousand dollars each in advance.

It is hereby agreed that an inventory of all the permanent and standing fixtures left by the party of the first part in said demised premises, shall be made out and attached to this lease, and the same shall be returned in like good condition at the expiration hereof.

It is also agreed that the said parties of the second part can put in the said demised premises such additional counters and fixtures as they may require for their convenience, at their own expense, and to cut one door-way through the partition wall under the arch, left originally for that purpose, and at the expiration of this lease to remove the same on condition only that they close the said door and remove the said fixtures without injury to said building, it being understood the said
156 building shall be left clean and in good tenantable condition.

It is likewise agreed that the said parties of the second part shall not receive in said demised premises, either for their own account or on storage, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility; that they will, during the term of this lease, occupy the premises solely for the business of their calling, to wit, banking and express offices, and that they are not to underlet the same to any other person or persons, for any other business, neither in part or the whole, without the prior consent in writing of the party of the first part, his executors, or administrators, under a forfeiture of this lease from such time or date, and the right to collect the entire rent in full for the unexpired term, and re-enter the said demised premises as he would do at the expiration of this lease.

It is also agreed that, at the expiration of this lease, the said parties of the second part, shall have the privilege of renewing the same for the full term of two years more upon the same terms in all respects as expressed herein, and upon paying the said yearly rent of twelve
157 thousand dollars in instalments of one thousand dollars each, monthly in advance, and that they shall give to the party of the first part notice of their intention at least sixty days prior to the expiration of the two years hereinbefore expressed.

It is further agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenents herein contained, then it shall be lawful for the said party of the first part to re-enter the said demised premises, and to remove all persons therefrom, and to distrain any goods, chattels, or other property found therein, which remedies or either of them shall not preclude the said party of the first part from recovering the aforesaid rent in full for the unexpired time, or any further damages he may sustain by reason of the breach thereof.

And the said parties of the second part do covenant to pay to the said party of the first part, or his representatives, the rent of twelve thousand dollars per annum for two years, in monthly instalments of one thousand dollars each, payable in advance, and, at the expiration of the said term, to quit and surrender the said demised premises, with all fixtures therein contained, in as good conditon as the reason-
158 able use and wear thereof will permit, damages by the elements excepted.

And the said party of the first part doth covenant and agree that the said parties of the second part, on paying the said rent in manner aforesaid, and performing the other covenants herein contained, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the said term of two years.

In witness whereof the said party of the first part hath hereunto set his hand and affixed his seal, and the said parties of the second part hath hereunto subscribed the name of their said firm this day and year first above-written.

(Signed) JOHN PARROTT. [SEAL.]
WELLS, FARGO & CO. [SEAL.]

Witness to both signatures.
WM. T. ARMSTRONG.
I. DURBROW.

(Endorsed:) Filed Nov. 30, 1869. Geo. E. Whitney, clerk. By H. F. Lardner, D. C.

159 *Findings of the court.*

Circuit court of the United States of the ninth judicial circuit in and for the district of California.

JOHN PARROTT
vs.
D. N. BARNEY ET AL. } No. 335.—Findings.

FINDINGS OF FACT.

The defendants constitute the well-known express company, doing business under the name of Wells, Fargo & Co. The plaintiff had, for many years prior to the commission of the grievances complained of, been, and he then was, seized in fee of the premises in question. On the seventh day of November, 1855, said plaintiff leased to defendants for a period of two years from the first day of January, 1856, a portion of said premises described in the lease as "the basement and first floors contained in that certain granite building, situate in the city of San Francisco, on the northwest corner of California and Montgomery streets, together with all vaults and permanent banking fixtures therein con-

tained; together with the use of a brick warehouse in the rear,
160 thirty by sixty feet, and the right of way, and for passage thereto through the back yard of said premises, and all appurtenances thereunto belonging." Said lease contained the following covenants on the part of the defendants, viz: "It is likewise agreed that the said parties of the second part shall not receive in said demised premises, either for their own account, or on storage, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility; that they will, during the term of this lease, occupy the premises solely for the business of their calling, to wit, banking and express office, and that they are not to under-let the same to any other person or persons for any other business, in part or the whole, without the prior consent in writing of the party of the first part." The defendants also covenant: "At the expiration of the said term to quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted." The rent was twelve thousand dollars per annum, payable in monthly installments of one thousand dollars each, in advance. The lease was, afterwards, renewed on
161 the same terms, for two years, from January, 1st, 1858, and again for a term of two years from January 1st, 1860. After the expiration of the latter term the premises were held over from year to year, without any further special agreement, until the sixteenth day of April, 1866, the time of the commission of the alleged grievance, the defendants all the time paying rent to the plaintiff in accordance with the terms of said lease. Before, and at the last-mentioned time, one Garrett W. Bell, as tenant from year to year of said plaintiff, occupied a portion of the buildings described in the complaint, to wit: "The first or lower floor of said iron building, and of that of the said brick building, situate to the northwest thereof, and called a furnace;" also a certain corporation, called "The Union Club of San Francisco," as tenant of plaintiff, upon terms hereinafter stated, was in the possession and occupation of the remaining portions of the said premises, being the whole above the first or lower floor of all the said buildings and premises. The immediate reversion of the whole of said premises, as well as those demised to the defendants as those occupied by said Bell and the Union Club, remaining all the time in said plaintiff. The portion of the prem-
162 ises occupied by said defendants had been used for their banking and express business, as provided in the said lease, from the commencement of the term down to and including the sixteenth day of April, 1866. The defendants, during all that time, were carrying on the business of public express carriers throughout the States and Territories of the Pacific coast, various parts of the United States, and between the United States and Europe; also, between New York and San Francisco, by the way of the Isthmus of Panama, using on the latter route the steamships of the Pacific Mail Steamship Company's lines running between New York and Aspinwall, and Panama and San Francisco, to convey their express matter, transporting the same across the Isthmus by the Panama Railroad. The said steamers, at that time, left New York three times each month—on the 1st, 11th, and 21st days of the month. It was a regulation established by defendants that no express freight should be received at the wharf in New York on days appointed for the steamers to leave New York for Aspinwall. The said steamers sailed from Pier No. 42 North River. On the afternoon of the last regular day for the steamer to leave New York for Aspinwall, prior to March, 14th, 1866, and after the steamer had left, a man brought

163 to pier No. 42 North River, from which said steamers take their departure, a case in a wagon, and asked Patrick O'Leary, who was an employé of the defendants, to receive it. O'Leary was the defendants freight measurer on pier No. 42. O'Leary informed him that they did not receive freight on the day of the steamer's sailing. The man said it would be hard to require him to take it back as he had brought it a great way, from Harlem, some seven miles distant. O'Leary told him that, since he had brought it so far, he could leave it there at his own risk, but that he could not give a receipt for it on that day; that the party must come the next day and get a receipt. The party then carried in the case, and placed it opposite the freight office on the dock. O'Leary then noticed that the case had not been marked or weighed, or strapped, as required by defendants' regulations, and called the party's attention to these facts. Whereupon he requested O'Leary to weigh, mark, and strap the same, saying that he would pay for it. O'Leary then, in pursuance of the party's directions, marked upon the box the address, "W. H. Mills, Los Angeles, Cal.; Fast." He also procured some wooden straps, or hoops, some nails and an adz, and strapped the
164 case, driving the nails through the hoops or straps into the case, as required by defendant's regulations. The case then lay there ten days, till the next steamer left. Two days after the case had been thus left, the party who brought it came down and applied to O'Leary for a receipt, and O'Leary told Mr. Middlebrook to give a receipt for the case, and Mr. Middlebrook, who was the tally clerk at the time, and the proper party to give the receipt, did so in the presence of O'Leary. At the time the case was presented it was clean, and appeared to be in perfect condition. There was nothing suspicious about its appearance. The only thing wanting to make it conform to the regulations of the defendants was, it required strapping, weighing, and marking, and when strapped, weighed, and marked by O'Leary, it appeared to be in all respects in proper condition for shipment. The case was an ordinary wooden box used for shipping goods in, apparently some two and a half feet square by three feet long. It measured fourteen feet eleven inches cubic measure, and weighed three hundred and twenty-nine pounds. The usual course of business in receiving such freight is, that O'Leary received and marked it, Middlebrook gave a receipt for it, and it then remained on the wharf with other freight without any one taking other
165 special notice of it, till it was carried on board ship and stowed by the stevedores, and this case took the usual course. The party receiving the receipt subsequently presents it at the office to the express receipt clerk, who takes it up, and from it makes out the ordinary express receipt and delivers it to the shipper. In this instance the receipt thus given by Middlebrook was surrendered and the usual express receipt given. The receipt given by the tally-clerk (such as that given by Middlebrook in this instance) on the delivery of the freight, is the original from which the express receipts, bills of lading, manifest, and all others are made up. The clerk making out the express receipt for the shipper, or the bill of lading, as the case may be, is governed by this original, and he does not see or inspect the freight itself. After express matter is thus delivered, and the said original receipt is given to the party delivering it, it goes into the general mass of freight of that kind, and there remains till taken on board the steamer. Neither at the time of the delivery of the case in question nor of the taking of said receipt was there anything said about the contents of this box, either between O'Leary and the party bringing it, or between the latter
166 and O'Leary and Middlebrook, nor at any other time, nor, so far

as appears by the evidence, at any time to the defendants or any of their employees, and neither of said employees or defendants had any idea or suspicion that it contained anything dangerous. No questions were asked as to its contents, and no information given. The said case was shipped, with a large quantity of other express freight, on the steamer that left New York for California on the 21st March, 1866. At that time the defendants sometimes carried to California as many as six thousand packages, put up in cases of a similar character and appearance, per steamer, in addition to a large number shipped for Panama, South America, Mexico, and other places; and a fair average of such packages of merchandise shipped to California by each, was from four to five thousand The steamer from Panama, connecting with the steamer which left New York on the 21st of March, arrived in San Francisco in due time on the 13th or 14th of April, having the said case on board. On the afternoon of the 14th the said case was taken from the vessel and placed upon the wharf, and was found to be leaking. The leakage had evidently commenced since the steamer left Panama, and the substance leaking from the case had the general appearance
167 of sweet or salad oil. Said case was left on the wharf till the morning of the sixteenth day of April, when, in pursuance of the regular and ordinary course of defendant's business, where express-freight is found to be damaged, it, together with another case of somewhat similar appearance, containing silverware, which had been stained by the substance leaking from the case in question, and appeared to be in a damaged condition, was sent by a dray to defendants' office, the premises in question, for examination, and the steamship company notified to send an agent to be present and examine the package in conjunction with an agent of the defendants, for the purpose of ascertaining the nature and extent of the damage, and of determining, if possible, whether the responsibility for the damage rested upon the steamship company. The two packages were taken to the premises in question by defendants' servants, and deposited on said premises in the open court or yard, in the rear of the express office, and between it and the premises occupied by Bell, which was the usual place of examination of such packages when found to be damaged. About one o'clock p. m., Mr. Havens, as the representative of the Pacific Mail Steamship Com-
168 pany, and Mr. Webster, of the defendants, in company with another of defendants' employees, and, in the presence of Mr. Knight, the second person in authority in the management of defendants' business on the Pacific coast, with a mallet and chisel proceeded to open the case for examination, and while engaged in opening the said case with the mallet and chisel, the substance contained in it exploded, instantly killing all the said parties, and one or two others, besides destroying and greatly injuring the premises in question in the manner described in the complaint. The plan and mode of opening and examining the case in question was the same usually adopted in the ordinary course of the defendants' business, in respect to packages of a similar appearance. Upon a subsequent examination and experiment with chips saturated with the liquid which had leaked from this case, taken from the wharf and other places where said leakage had occurred, it was ascertained that the substance contained in the package was nitro-glycerine or glonoin oil. The said case contained some thirty gallons of nitro-glycerine, and that the explosion of this substance occasioned the loss of life and injuries stated. Nitro-glycerine when pure is a nearly colorless substance, but when impure it is nearly the color and con-
169 sistency of sweet or salad oil. It is a liquid, and violently explosive. It is exploded by percussion and concussion, and by a high degree

of pressure, but not by the mere contact with fire, either with flame or a burning coal. It will burn slowly without exploding by applying a flame to it while the flame is in actual contact, but when the flame is withdrawn, it will cease to burn. Although it will burn while in contact with the flame, yet it takes fire with difficulty, and is not, in the common sense of the term, "apt to take fire." It is not dangerous from the mere application of flame—as the flame of a candle—but in explosion combustion takes place, and in that view it is combustible and dangerous. It will also explode upon being heated to a temperature of some 360 degrees Fahrenheit. It gradually decomposes when kept, and decomposition in a closed vessel disengages gases, the pressure alone of which may spontaneously explode it. Pressure, or the application of force, is the immediate cause of the explosion. In this instance, the nitro-glycerine, in one or more of the cans contained in the case in question, had doubtless become partially decomposed, generating gases which occasioned pressure within the can, and a greater tendency
170 to explode from external forces and the percussion or concussion resulting from opening the box with the mallet and chisel, operating in connection with such internal pressure, must have produced the explosion. Its discovery was announced in 1847, by Sobrero, a chemist at Paris. In 1848 or 1849, Dr. Herring, of Philadelphia, made experiments with to test its medical properties, and proposed for it the name of "glonoine." Thereafter it was experimented with by various chemists, and its constituents and properties were mentioned in chemical treatises and scientific publications, and were taught as part of a college course of chemistry in some colleges as early as 1862; but prior to 1864, experiments upon nitro-glycerine were confined wholly to the laboratory of the chemist. It was only made in small quantities for scientific purposes. In 1864, it was proposed by Noble, in England, for blasting purposes. In June, 1865, he made some experiments in blasting, demonstrated its extraordinary power, and introduced it, to a limited extent, in some of the European quarries and mines. He also published in England, in the summer of 1865, a pamphlet setting forth its qualities, and advocating such use of it, as possessing, in volume,
171 about thirteen times, and in weight eight times the explosive force of gunpowder. He patented it in England as Noble's Patent Blasting Oil. An account of the constituents, mode of preparing, and properties of nitro-glycerine was published on the 18th of November, 1865, in the "Scientific American," a weekly periodical published in the city of New York, devoted to the expositions of subjects connected with science and the useful arts. In said article, Noble proposed to use it for blasting purposes, and his claims of its superiority therefor over gunpowder are set forth and commented on, directions for its use given, &c.

In December, 1865, an accidental explosion of nitro-glycerine occurred at a hotel in the city of New York, which was mentioned in the newspapers of the day.

The second steamer arriving from Panama, prior to the arrival of the steamer bringing the case in question, being some twenty days prior to the latter's arrival, brought a consignment of nitro-glycerine to Bandmann, Nielsen & Co., of San Francisco, which had been shipped to that house by Noble for sale, direct from Hamburg, by way of Panama. Letters of advice of said shipment had come to Bandmann, Neilsen
172 & Co., by a previous steamer, and the firm had published circulars stating the fact that they would have the new blasting agent for sale, and stating its properties, and had sent them to various news-

papers, some of which had noticed it in their columns. Among these, at the solicitation of said firm, the San Francisco Mining and Scientific Press, a weekly publication issued in San Francisco, devoted especially to mining and scientific matters, in the numbers of the 23d and 30th of December, 1865, called attention to nitro-glycerine as a blasting agent, in two articles, illustrating, with cuts, the mode of using it, and containing testimonials of its extraordinary explosive force, and accounts of experiments with it, made the summer preceding in mines and quarries on the continent of Europe. The said defendants subscribed for and received at their place of business, in San Francisco, together with a large number of other periodicals and publications, the said periodical, but they seldom read it, and did not read or notice the said articles on nitro-glycerine. Upon the arrival of said shipment by said steamers from Panama, Bandmann, Nielson & Co. made some experiments in the vicinity of San Francisco in private, excepting in the presence of
173 two or three persons, testing its properties, which proved successful, and they let the Central Pacific Railroad Company have some for trial, and had just received a favorable report from the engineer, which Mr. Bandmann was in the act of copying at the moment of the explosion in question, at defendants' office.

Until the receipt of the advice of the said shipment from Noble, Bandmann had never heard of nitro-glycerine, glonoin oil, or Noble's patent blasting oil, and he did not know of the existence of such a substance. A second shipment of nitro-glycerine was made by Noble to Bandmann, Nielsen & Co., from Hamburg, by the steamer "European," which exploded, destroying the said steamship at Aspinwall, on the eighth day of April, 1866, eight days before the said explosion at defendants' express office; but the news of the explosion at Aspinwall had not reached San Francisco on the day of the explosion now in question. Although Noble made some efforts to bring his nitro-glycerine into notice in 1865, and had made these two shipments to Bandmann, Nielsen & Co. early in 1866, and the latter had taken the steps indicated, to bring it to
174 the notice of the public in California, at the time the case in question was shipped at New York and received at San Francisco, nitro-glycerine was generally unknown to the public as an article of commerce of practical utility or otherwise, and was unknown to parties engaged in the business of transportation; and at that time, there was no oil or liquid of an explosive character like nitro-glycerine, known to commerce; and even among scientific men, the properties of nitro-glycerine were not so well understood as at present. The two explosions at Aspinwall and San Francisco, and the subsequent ones at Sidney and in England, called the attention of scientific men to the subject, and led to fuller investigations, and more precise knowledge of its properties. Neither the defendants, nor any of the employees of the defendants, nor of the Pacific Mail Steamship Company, who had anything to do with the package in question, nor the managing agent of the defendants on the Pacific coast, nor any of those killed by the explosion, knew the contents of the case in question, or had any means of such knowledge, or had any reason to suspect its dangerous character, nor did they
175 know anything about nitro-glycerine or glonoin oil, or that it was dangerous. The case had the appearance of other cases usually received in the ordinary course of defendants' business, was received and handled by the employees of the defendants in the same way that other cases of similar appearance were usually received and handled, and in the mode that men of prudence engaged in the same business would have handled packages having a similar appearance in the ordi-

nary course of business, when ignorant of its contents, and with similar means of knowledge as that possessed by defendants and their employees in the instance under consideration. There was no negligence on the part of the defendants in receiving said package, or in their failure to ascertain the dangerous character of the contents; or in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, no negligence in the handling of the said package at the time of the explosion. The defendants either repaired or paid for the repairs (to the amount of about six thousand dollars) of the premises occupied by themselves, except
176 a portion of certain repairs made by plaintiff, which were necessarily made in connection with repairs made to those portions of the premises occupied by the other tenants of the plaintiff, and which defendants omitted to pay for by mistake.

The value of the repairs to the said premises occupied by defendants and chargeable thereto, thus omitted to be paid by them, is one thousand seven hundred and eighty-seven dollars and sixty-two cents.

The damages resulting from said explosion to the premises not occupied or held by the defendants, but occupied by the other tenants of plaintiff named in the complaint, viz, Bell and the Union Club, is twelve thousand eight hundred and fourteen dollars and sixteen cents.

The portions of the injured premises occupied by the Union Club at the time of the explosion, were so occupied under a verbal agreement with the plaintiff, to hold for two years from the first of February, 1866, at a rent of five hundred and sixty dollars per month. The said lessees were "to keep the premises in ordinary repair—in decent, tenantable repair." This rent was paid up to the date of the explosion. Af
177 ter the explosion the Union Club refused to pay rent, on the ground that the premises were in an untentantable condition, and did not pay rent from the fifteenth day of April, till the first day of August—a period of three and one-half months; and the rents for said period, according to the terms of the said verbal agreement, and which said Union Club did not pay, amount to nineteen hundred and sixty dollars.

The premises, during all of said period, were in an untent*ant*able condition in consequence of said explosion, and said time was occupied in making necessary repairs, and the said time was a reasonable time for making said repairs.

The said several amounts found are values and damages respectively in gold coin.

CONCLUSIONS OF LAW.

And, from the foregoing facts, the court finds, as conclusions of law—

1st. That the injuries and damages done to the premises, demised by the plaintiff to the defendants, and occupied by the latter,
178 constituted waste by the defendants as tenants of the plaintiff, for which the defendants became liable.

2nd. That the defendants, having paid the sum of six thousand dollars only for the repair of the premises demised to them, are liable for the balance paid by the plaintiff on said premises, viz: one thousand seven hundred and eighty-seven dollars and sixty-two cents, with interest thereon at ten per cent. per annum from the first day of August, 1866.

3rd. That the defendants are not liable for any damage to the premises of the plaintiff, caused by said explosion, other than the premises demised to the defendants.

4th. That the defendants are not liable to the plaintiff for the value of the rents of the premises, demised to said Union Club at the time of said explosion, during the period of time occupied in repairing said premises or any part thereof.

179 Let judgment be entered for the plaintiff for the sum of two thousand five hundred and eighty-nine dollars and fifty-six cents, gold coin of the United States, and costs of suit taxed at seven hundred and five $\frac{44}{100}$ dollars, this 25th January, 1871.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed April 7, 1871. L. S. B. Sawyer, clerk, by J. F. O'Beirne, D. C.

Judgment.

180 In the circuit court of the United States, of the ninth judicial circuit, in and for the district of California.

JOHN PARROTT
vs.
D. N. BARNEY ET AL. } No. 335.

This cause having come on regularly for trial on the 28th day of March, A. D. 1870, being a day in the February term, 1870, of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties duly filed with the clerk of said court, John T. Doyle, and J. P. Hoge, esq's, appearing on behalf of plaintiff, and S. M. Wilson, esq., appearing on behalf of defendants, and the trial having been proceeded with upon the 4th, 5th, 6th, 7th, 8th, 21st, 22d, and 23d days of April, of said term and year, and witnesses on the part of the respective parties, having been duly sworn and examined, and the evidence being closed, the cause having, after argument of counsel, been submitted to the court for consideration and decision; and, after due deliberation thereon, the court, having, on the 25th day of January,

181 A. D. 1871, being a day in the October term, 1870, of said court, ordered judgment in accordance with its finding to be filed, which finding was, on the 7th day of April, A. D. 1871, being a day in the February term, 1871, of said court, filed.

Now, therefore, by reason of the law and the finding aforesaid, it is considered by the court now here that John Parrott, plaintiff, do recover of, and from, D. N. Barney, Henry Wells, Thomas M. Janes, William G. Fargo, Louis McLane, and James McCay, defendants, in the gold coin of the United States, for the waste in the first count of the said complaint complained of, the sum of two thousand six hundred and twenty-five dollars and eighty-cents, (2,625.80,) parcel of the damages in said complaint demanded by him, and also seven hundred and five dollars and forty-four cents, for his costs and charges by him about his suit in this behalf expended by the said court now here adjudged to the said plaintiff; and as to the matters in the second, third, and fourth counts of the said complaint alleged, that the said defendants be acquitted thereof, and go thereof without day.

182 Judgment entered this 7th day of April, A. D. 1871.

L. S. B. SAWYER, *Clerk.*

A true copy of an original, entered in the therein entitled action, in judgment register, C. L. No. 1, p's 440 and 441.
Attest, &c.
[SEAL.] L. S. B. SAWYER, *Clerk.*

Certificate to judg't-roll.

U. S. circuit court, 9th jud'l cir. dist. of Cal'a.

JOHN PARROTT. *vs.* D. N. BARNEY ET AL. } No. 335.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, district of California, do hereby certify that the foregoing papers, attached together, constitute the judgment-roll in the cause above entitled.
183 Witness my hand and the seal of said circuit court, this 22d day of April, 1871.
[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 7 April, 1871. L. S. B. Sawyer, clerk.
(Endorsed:) Judgment-roll, filed April 22d, 1871. L. S. B. Sawyer, clerk.

184 *Bill of exceptions.*

Circuit court of the United States of the ninth judicial circuit, in and for the district of California.

JOHN PARROTT *vs.* D. N. BARNEY ET AL. } No. 335. Bill of exceptions.

Be it remembered that, on the trial of the issues joined in this action before the Honorable Lorenzo Sawyer, circuit judge, without a jury, (a jury having been expressly waived in due form of law,) proof was made of the following facts, namely:
The defendants constitute the well-known express company, doing business under the name of Wells, Fargo & Co. The plaintiff had, for many years prior to the commission of the grievances complained of, been, and he then was, seized in fee of the premises in question. On the seventh day of November, 1855, said plaintiff leased to defendants for a period of two years from the first day of January, 1856, a portion of said premises described in the lease as "The basement and first floors contained in that certain granite building, situate in the city of San Francisco, on the northwest corner of California and Mont-
185 gomery streets, together with all vaults and permanent banking fixtures therein contained; together with the use of a brick ware-house in the rear, thirty by sixty feet, and the right of way and for passage thereto through the back yard of said premises, and all appurtenances thereunto belonging." Said lease contained the following covenants on the part of defendants, viz:
"It is likewise agreed that the said parties of the second part shall not receive in said demised premises, either for their own account or on storage, or allow any person to place therein, gunpowder, alcohol, or

any other articles dangerous from their combustibility; that they will, during the term of this lease, occupy the premises solely for the business of their calling, to wit, banking and express office; and that they are not to underlet the same to any other person or persons, for any other business in part or the whole, without the prior consent in writing of the party of the first part."

The defendants, also, covenant, "At the expiration of the said term to quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted." The
186 rent was twelve thousand dollars per annum, payable in monthly installments of one thousand dollars each, in advance. The lease was afterwards renewed on the same terms for two years, from January 1st, 1858, and again for a term of two years, from January 1st, 1860. After the expiration of the latter term, the premises were held over from year to year, without any further special agreement, until the sixteenth day of April, 1866, the time of the commission of the alleged grievance, the defendants all the time paying rent to the plaintiff in accordance with the terms of said lease.

Before, and at the last-mentioned time, one Garrett W. Bell, as tenant from year to year of said plaintiff, occupied a portion of the buildings described in the complaint, to wit, "The first, or lower floor of said iron building, and of that of the said brick building, situate to the northwest thereof, and called a furnace;" also, a certain corporation, called "The Union Club of San Francisco," as tenant of plaintiff, upon terms hereinafter stated, was in the possession and occupation of the remaining portions of the said premises, being the whole above the first or lower floor of all the said buildings and premises. The
187 immediate reversion of the whole of the said premises as well those demised to the defendants as those occupied by said Bell and the Union Club, remaining all the said time in this plaintiff. The portion of the premises occupied by said defendants had been used for their banking and express business, as provided in the said lease, from the commencement of the term down to and including the sixteenth day of April, 1866. The defendants, during all that time, were carrying on the business of public express carriers throughout various parts of the United States, the States and Territories of the Pacific coast, and between the United States and Europe; also, between New York and San Francisco, by the way of the Isthmus of Panama, using, on the latter route, the steamships of the Pacific Mail Steamship Company's lines, running between New York and Aspinwall, and Panama and San Francisco, to convey their express matter, transporting the same across the Isthmus by the Panama Railroad. The said steamers at that time left New York three times each month, on the 1st, 11th, and 21st days of the month. It was a regulation established by defend-
ants, that no express freight should be received at the wharf
188 in New York on days appointed for the steamers to leave New York for Aspinwall. The said steamers sailed from pier No. 42 North River.

On the afternoon of the last regular day for the steamer to leave New York for Aspinwall, prior to March 14th, 1866, and after the steamer had left, a man brought to pier No. 42 North River, from which said steamers take their departure, a case in a wagon, and asked Patrick O'Leary, who was an employee of the defendants, to receive it. O'Leary was the defendants' freight-measurer on pier No. 42. O'Leary informed him that they did not receive freight on the day of the steamer's sailing.

The man said it would be hard to require him to take it back, as he had brought it a great way—from Harlem—some seven miles distant. O'Leary told him that, since he had brought it so far, he could leave it there at his own risk; but that he could not give a receipt for it on that day; that the party must come the next day and get a receipt. The party then carried in the case and placed it opposite the freight office, on the dock. O'Leary then noticed that the case had not been
189 marked or weighed, or strapped, as required by defendants' regulations, and called the party's attention to these facts; whereupon he requested O'Leary to weigh, mark, and strap the same, saying that he would pay for it. O'Leary then, in pursuance of the party's directions, marked upon the box the address "W. H. Mills, Los Angeles, Cal. Fast." He also procured some wooden straps or hoops, some nails, and an adz, and strapped the case, driving the nails through the hoops or straps into the case, as required by defendants' regulations. The case then lay there ten days, till the next steamer left. Two days after the case had been thus left, the party who brought it came down and applied to O'Leary for a receipt, and O'Leary told Mr. Middlebrook to give a receipt for the case; and Mr. Middlebrook, who was the tally-clerk at the time and the proper party to give the receipt, did so in the presence of O'Leary. At the time the case was presented it was clean, and appeared to be in perfect condition. There was nothing suspicious about its appearance. The only thing wanting to make it conform to the regulations of the defendants was it required strapping, weighing, and marking, and when strapped, weighed, and marked by
190 O'Leary it appeared to be, in all respects, in proper condition for shipment. The case was an ordinary wooden box, used for shipping goods in, apparently some two and a half feet square by three feet long. It measured fourteen feet eleven inches, cubic measure, and weighed three hundred and twenty-nine pounds. The usual course of business in receiving such freight is, that O'Leary received and marked it, Middlebrook gave a receipt for it, and it then remained on the wharf with other freight without any one taking other special notice of it till it was carried on board ship and stowed by the stevedores; and this case took the usual course. The party receiving the receipt subsequently presents it at the office to the express receipt clerk, who takes it up, and from it makes out the ordinary express receipt, and delivers it to the shipper. In this instance the receipt thus given by Middlebrook was surrendered and the usual express receipt given. The receipt given by the tally-clerk (such as that given by Middlebrook in this instance) on the delivery of the freight is the original from which the express receipts, bills of lading, manifest, and all others are made up.
The clerk making out the express receipt for the shipper, or
191 the bill of lading, as the case may be, is governed by this original, and he does not see or inspect the freight itself. After express matter is thus delivered, and the said original receipt is given to the party delivering it, it goes into the general mass of freight of that kind, and there remains till taken on board the steamer. Neither at the time of the delivery of the case in question nor of the taking of said receipt was there anything said about the contents of this box, either between O'Leary and the party bringing it or between the latter and O'Leary and Middlebrook, nor at any other time; nor, so far as appears by the evidence, at any time to the defendants, or any of their employees, and neither of said employees or defendants had any idea or suspicion that it contained anything dangerous. No questions were asked as to its contents, and no information given. The said case was shipped

with a large quantity of other express freight on the steamer that left New York for California on the 21st of March, 1866. At that time the defendants sometimes carried to California as many as six thousand packages, put up in cases of a similar character and appearance,
192 per steamer, in addition to a large number shipped for Panama, South America, Mexico, and other places, and a fair average of such packages of merchandise, shipped to California, by each steamer, was from four to five thousand. The steamer from Panama, connecting with the steamer which left New York on the 21st of March, arrived in San Francisco in due time, on the 13th or 14th of April, having the said case on board. On the afternoon of the 14th, the said case was taken from the vessel, and placed upon the wharf, and was found to be leaking. The leakage had evidently commenced since the steamer left Panama, and the substance leaking from the case had the general appearance of sweet or salad oil. Said case was left on the wharf till the morning of the sixteenth day of April, when, in pursuance of the regular and ordinary course of defendants' business, where express freight is found to be damaged, it, together with another case of somewhat similar appearance, containing silverware, which had been stained by the substance leaking from the case in question, and appeared to be in a damaged condition, was sent by a dray to defendants' office, the premises
193 in question, for examination, and the steamship company notified to send an agent to be present and examine the package in conjunction with an agent of the defendants, for the purpose of ascertaining the nature and extent of the damage, and of determining, if possible, whether the responsibility for the damage rested upon the steamship company. The two packages were taken to the premises in question by defendants' servants, and deposited on said premises in the open court or yard, in the rear of the express office, and between it and the premises occupied by Bell, which was the usual place of examination of such packages, when found to be damaged. About one o'clock p. m. Mr. Havens, as the representative of the Pacific Mail Steamship Company, and Mr. Webster, of the defendants, in company with another of defendants' employees, and in the presence of Mr. Knight, the second person in authority in the management of defendants' business on the Pacific coast, with a mallet and chisel, proceeded to open the case for examination, and while engaged in opening the said case with the mallet and chisel, the substance contained in it exploded, instantly
194 killing all the said parties, and one or two others, besides destroying and greatly injuring the premises in question in the manner described in the complaint. The plan and mode of opening and examining the case in question, was the same usually adopted in the ordinary course of the defendants' business in respect to packages of a similar appearance. Upon a subsequent examination and experiment with chips, saturated with the liquid, which had leaked from this case, taken from the wharf and other places where said leakage had occurred, it was ascertained that the substance contained in the package was nitro-glycerine or glonoin oil. The said case, contained some thirty gallons of nitro-glycerine, and the explosion of this substance occasioned the loss of life and injuries stated. Nitro-glycerine, when pure, is a nearly colorless substance, but when impure, it is nearly the color and consistency of sweet or salad oil. It is a liquid, and violently explosive. It is exploded by percussion and concussion, and by a high degree of pressure, but not by the mere contact with fire, either with flame or a burning coal. It will burn slowly without exploding, by applying
195 a flame to it, while the flame is in actual contact, but when the flame is withdrawn, it will cease to burn. Although it will burn

while in contact with the flame, yet it takes fire with difficulty, and is not, in the common sense of the term, "apt to take fire." It is not dangerous from the mere application of flame, as the flame of a candle, but in explosion combustion takes place, and in that view it is combustible and dangerous. It will also explode upon being heated to a temperature of some 360 degrees Fahrenheit. It gradually decomposes when kept, and decomposition in a close vessel disengages gases, the pressure alone of which may spontaneously explode it. Pressure or the application of force is the immediate cause of the explosion. In this instance the nitro-glycerine, in one or more of the cans, contained in the case in question, had, doubtless, become partially decomposed, generating gases, which occasioned pressure within the can, and a greater tendency to explode from external forces, and the percussion or concussion, resulting from opening the box with the mallet and chisel operating in connection with such internal pressure, must have produced the explosion.

196 Its discovery was announced in 1847, by Sobrero, a chemist, at Paris. In 1848 or 1849, Dr. Herring of Philadelphia, made experiments with it to test its medical properties, and proposed for it the name of "glonoine." Thereafter it was experimented with by various chemists, and its constituents and properties were mentioned in chemical treatises and scientific publications, and were taught as part of a college course of chemistry, in some colleges as early as 1862; but prior to 1864, experiments upon nitro-glycerine were confined wholly to the laboratory of the chemist. It was only made in small quantities for scientific purposes. In 1864, it was proposed by Noble, in England, for blasting purposes. In June, 1865, he made some experiments in blasting, demonstrated its extraordinary power, and introduced it to a limited extent in some of the European quarries and mines. He also published in England, in the summer of 1865, a pamphlet setting forth its qualities and advocating such use of it, as possessing in volume about thirteen times and in weight eight times the explosive force of gunpowder. He patented it in England as Noble's Patent Blasting Oil.

197 An account of the constituents, mode of preparing, and properties of nitro-glycerine was published on the 18th day of November, 1865, in the "Scientific American," a weekly periodical, published in the city of New York, devoted to the exposition of subjects connected with science and the useful arts. In said article, Noble proposed to use it for blasting purposes, and his claims of its superiority therefor over gunpowder are set forth and commented on, and directions for its use given, &c.

In December, 1865, an accidental explosion of nitro-glycerine occurred at a hotel in the city of New York, which was mentioned in the newspapers of the day. The second steamer arriving from Panama, prior to the arrival of the steamer bringing the case in question, being some twenty days prior to the latter's arrival, brought a consignment of nitro-glycerine to Bandmann, Nielsen & Co., of San Francisco, which had been shipped to that house by Noble for sale, direct from Hamburg, by way of Panama. Letters of advice of said shipment had come to Bandmann, Nielsen & Co., by a previous steamer, and the firm had published circulars stating the fact that they would have the new

198 blasting agent for sale, and stating its properties, and had sent them to various newspapers, some of which had noticed it in their columns. Among these, at the solicitation of said firm, the San Francisco Mining and Scientific Press, a weekly publication issued in San Francisco, devoted especially to mining and scientific matters, in the numbers of the 23d and 30th of December, 1865, called attention to nitro-glycerine as a blasting agent, in two articles, illustrating with cuts the

mode of using it, and containing testimonials of its extraordinary explosive force and accounts of experiments with it, made the summer preceding, in mines and quarries on the continent of Europe. The said defendants subscribed for and received at their place of business in San Francisco, together with a large number of other periodicals and publications the said periodical, but they seldom read it, and did not read or notice the said article on nitro-glycerine. Upon the arrival of said shipment by said steamer from Panama, Bandmann, Nielsen & Co. made some experiments in the vicinity of San Francisco, in private, except in the presence of two or three persons, testing its properties, which proved successful; and they let the Central Pacific Rail-
199 road Company have some for trial, and had just received a favorable report from the engineer, which Mr. Bandmann was in the act of copying at the moment of the explosion in question at defendants' office.

Until the receipt of the advice of the said shipment from Noble, Bandmann had never heard of nitro-glycerine, glonoin oil, or Noble's Patent Blasting Oil, and he did not know of the existence of such a substance. A second shipment of nitro-glycerine was made by Noble to Bandmann, Nielsen & Co., from Hamburg, by the steamer "European," which exploded, destroying the said steamship, at Aspinwall, on the eighth day of April, 1866, eight days before the said explosion at defendant's express office; but the news of the explosion at Aspinwall had not reached San Francisco on the day of the explosion now in question. Although Noble made some efforts to bring his nitro-glycerine into notice, in 1865, and had made these two shipments to Bandmann, Nielsen & Co. early in 1866, and the latter had taken the steps indicated to bring it to the notice of the public in California, at the time the case in question was shipped at New York and received at San Francisco, nitro-glycerine was generally unknown to the public as an article of
200 commerce, of practical utility, or otherwise, and was unknown to parties engaged in the business of transportation; and at that time there was no oil or liquid of an explosive character like nitro-glycerine known to commerce; and even among scientific men the properties of nitro-glycerine were not so well understood as at present. The two explosions at Aspinwall and San Francisco, and the subsequent ones at Sidney and in England, called the attention of scientific men to the subject, and led to fuller investigations and more precise knowledge of its properties. Neither the defendants nor any of the employees of the defendants, nor of the Pacific Mail Steamship Company, who had anything to do with the package in question, nor the managing agent of the defendants on the Pacific coast, nor any of those killed by the explosion, knew the contents of the case in question, or had any means of such knowledge other than herein stated, or had any reason to suspect its dangerous character, nor did they know anything about nitro-glycerine or glonoin oil, or that it was dangerous. The case had the appearance of other cases usually received in the ordinary course of defendants' business, was received and handled by the employés
201 of the defendants in the same way that other cases of similar appearance were usually received and handled, and in the mode that men of prudence engaged in the same business would have handled packages having a similar appearance in the ordinary course of business, when ignorant of its contents, and with similar means of knowledge as that possessed by defendants and their employees in the instance here in question.

Whereupon, the foregoing being the substance of all the facts proved and given in evidence, the counsel for the plaintiff thereupon requested

his honor the judge, on the said state of facts, to determine and declare as matter of law that—

The defendants were chargeable with notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with the same. But his honor the judge then and there refused to so determine or declare; but, on the contrary, determined that there was no negligence on the part of the defendants in receiving said package or in their failure to ascertain the dangerous character of its contents; and in view of the condition of their
202 knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, there was no negligence in the handling of said package at the time of the explosion. To which refusal of the said judge, and his said decision, the counsel for the plaintiff then and there duly excepted.

The counsel for the plaintiff also then and there requested his honor the judge, on the proofs aforesaid, to determine and declare, as matter of law, that the defendants were guilty of negligence in the receiving, introducing, managing, handling, moving, opening, striking, and percussing of the said box containing said nitro-glycerine. Which decision and determination his honor refused to make; and to which refusal the plaintiff's counsel then and there duly excepted.

The plaintiff's counsel then and there further requested his honor the judge to determine and declare, as matter of law, that the defendants were liable to the plaintiff for all damages done by force and arms to his reversionary estate in the premises described in the complaint proceeding directly from the acts of themselves, or of their servants, in the ordinary course of the business of them the said defendants. Which
203 decision and determination his honor the judge refused to make, and the counsel for the said plaintiff then and there duly excepted.

And forasmuch as the matters aforesaid and evidence given, and the request so offered, and the exceptions so taken in the course of the said trial, do not appear in the record of the proceedings aforesaid, the counsel for the said plaintiff have prepared this bill of exceptions, containing the substance of all the matters proved on the trial aforesaid, and the requests made to the said judge and the exceptions taken thereon, and have requested his honor the judge to set his hand and seal thereto, which the said judge has done on the day and year and at the place aforesaid.

January 25, 1871.

LORENZO SAWYER, [SEAL.]
Circuit Judge.

(Endorsed:) Filed April 7, 1871. L. S. B. Sawyer, clerk, by J. F. O'Beirne, D. C.

204 *Assignment of errors.*

Supreme Court of the United States, of December term, in the year of our Lord one thousand eight hundred and seventy-one.

JOHN PARROTT, PLAINTIFF IN ERROR,
ag'st
D. N. BARNEY, THOMAS M. JANES, LOUIS McLane, Henry Wells, William G. Fargo, and James McKay, defendants in error. } In error.

Afterwards, to wit, on the first Monday of December, in this same

term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said John Parrott, by Doyle and Barber, his attorneys, and says that, in the record and proceedings aforesaid, and also in the rendition of the judgment aforesaid, there is manifest error, in this to wit:

First. By the record aforesaid, it appears that the judgment aforesaid given, on the second count in said declaration stated, was
205 given for the said defendants against the said plaintiff; whereas, by the law of the land, the said judgment therein ought to have been given for the said plaintiff against the said defendants.

Second. By the record aforesaid, it appears that the judgment aforesaid, given on the third count, in said declaration stated, was given for the said defendants against the said plaintiff; whereas, by the law of the land, the said judgment thereon ought to have been given for the said plaintiff against the said defendants.

Third. By the record aforesaid, it appears that the judgment aforesaid, given on the fourth count in said declaration stated, was given for the said defendants against the said plaintiff; whereas, by the law of the land, the said judgment thereon ought to have been given for the said plaintiff against the said defendants.

And the said plaintiff prays that the judgment aforesaid given on the second, third, and fourth counts, in said declaration stated, may be reversed and annulled, and that such judgment thereon, in favor
206 of the plaintiff against the defendants, be thereupon rendered by this court, as the said plaintiff is entitled to, and as should have been rendered thereon by the said circuit court; and that the plaintiff may be restored to all things which he hath lost by occasion of the said judgment.

DOYLE & BARBER,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed April 26, 1871. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep'ty cl'k.

207 *Bond on writ of error.*

Supreme Court of the United States.

Know all men by these presents that we, John Parrott and Montgomery Godley, of the city and county of San Francisco, State of California, are held and firmly bound unto D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay, in the sum of one thousand dollars, to be paid to the said D. N. Barney, Thomas N. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated the 25th day of April, A. D. 1871.

Whereas the above-named John Parrott hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by the circuit court of the United States for the district of California, upon the second, third, and fourth counts of the complaint, in a suit wherein the said John Parrott was plaintiff,
208 and the said D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay, were de-

fendants, and entered on the seventh day of April, A. D. 1871, in favor of said defendants against the said plaintiff:

Therefore, the condition of this obligation is such, that if the above-named John Parrott shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise to be and remain in full force and virtue.

JOHN PARROTT. [SEAL.]
MONTGOMERY GODLEY. [SEAL.]

Severally acknowledged before me this 25th day of April, A. D. 1871.

JOS. F. O'BEIRNE,
Comm'r U. S. Circuit C't 9th Cir., Dist. of Cal'a.

UNITED STATES OF AMERICA,
District of California ss:

Montgomery Godley, above-named, being sworn, deposes and says that he is a resident and freeholder of the city and county of
209 San Francisco, State of California; that he is worth the sum of two thousand dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

MONTGOMERY GODLEY.

Sworn to before me the 25th day of April, 1871.

JOS. F. O'BEIRNE,
Comm'r U. S. Cir. C't 9th Cir., Dist. of Cal'a.

(Endorsed:)

I approve of the form and sufficiency of the within bond.
April 26th, 1871.

LORENZO SAWYER,
Circuit Judge.

Filed April 26, A. D. 1871.

L. S. B. SAWYER, *Cl'k.*
By J. F. O'BEIRNE, *D. C.*

210 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing two hundred and nine written pages from 1 to 209 are a true copy of the record and of all proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court, this twenty-fourth day of October, A. D. 1871.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsement on cover:) No. 403. John Parrott, plaintiff in error, vs. D. N. Barney, Thomas M. Janes, Louis McLane, Henry Wells, William G. Fargo, and James McKay. California C. C. U. S. Filed 24th November, 1871.

Supreme Court of the United States.

JOHN PARROTT, Plaintiff in Error,

vs.

D. N. BARNEY et al., Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

POINTS AND AUTHORITIES AND REASONS FOR PLAINTIFF IN ERROR BY

R. M. CORWINE and
QUINTON CORWINE,
Attorneys.

McGill & Witherow, Printers, 1107 E street, Washington, D. C.

Supreme Court of the United States.

JOHN PARROTT, Plaintiff in Error
vs.
D. N. BARNEY, *et al.*, Defendants in Error.
No. 168.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

CASE.

Plaintiff is now, and was on the 16th April, 1866, the owner in fee of certain lands and tenements in the city of San Francisco, whereon are now and were then buildings constructed of iron, brick, and stone, which were then occupied for divers purposes and by many tenants, very remunerative to plaintiff. A portion of these tenements was leased to and was occupied by the defendants as a banking house and as a warehouse or storehouse, wherein they stored express goods. The rate per annum paid plaintiff by defendants for the use of said tenements was twelve thousand dollars, in monthly installments, in advance. Originally the contract was in writing, in the form of a lease, a copy of which is in the record, to be found at page 57, which was to run two years from the 1st January, 1856, to 31st December, 1857. At the expiration of that time the contract for renting was continued, and the lease was extended from year to year on the same terms up to the time of the happening of the events which caused this suit to be instituted.

The defendants were in possession of these tenements when the accident occurred, holding over under the lease. They were common carriers of goods, for hire, from New York to San Francisco and into the interior of California and other Pacific States and Territories. They used the steamers of the Pacific Mail Steamship Company, plying between New York and Aspinwall and Panama and San Francisco, and the Panama railroad to transport the goods across the Isthmus of Darien.

On the 16th of April, 1866, a box or case, which had arrived by the steamer from New York the day before, was deposited in the open court-yard, in the premises of plaintiff, between those occupied by one of his tenants (Bell) and the warehouse occupied by defendants, and while the employees of defendants were engaged in attempting to open said box or case, it exploded with such force and violence as to greatly injure and damage not only the premises occupied by defendants, but also those belonging to plaintiff and occupied by others of his tenants, whereby he sustained great pecuniary loss and was put to great expense: first, in interrupting the occupancy of said building by his other tenants for six months; and second, in the actual damage done to the building itself, whereby it was rendered uninhabitable for fully the term of six months, and in consequence of which plaintiff was obliged to expend large sums of money before it could be made habitable.

The record discloses, that the rule of the defendants, as common carriers, required that boxes or packages intended for shipment through them by the steamer should be hooped, marked, and weighed, and no freight *should* be received at the wharf in New York on the day appointed for the steamer to sail. These were regulations *established* by defendants and applicable alike to all shippers, as well as the goods shipped by that line.

On the last day for the steamer to leave New York for Aspinwall, prior to March 4, 1866, and after the steamer had left, a man brought to the pier from which the steamer

sailed a box in a wagon, and asked Patrick O'Leary, who was an employee of the defendants, to receive it.

O'Leary informed him of the above-named rules of the company. The man pressed its receipt, saying he had brought it seven miles, and it would be hard to take it back. It was not marked, nor strapped, nor weighed. The man told O'Leary if he would mark, strap, and weigh it, he would pay him for it. O'Leary did what he was requested to do, using a hammer and nails to strap it with. The man did not then get a receipt for it, but returned there two days afterward and got a receipt. Subsequently that receipt was surrendered, and another executed and delivered in its stead. It does not appear that the box or case was seen by any other person in the employ of the defendants beside O'Leary, although it was there for ten days before it was finally shipped. It further appears that no questions were asked as to the contents of the box or case, and none as to the name, business, or residence of the party who delivered it to defendants' agent, and, so far as appears, no name was given and none requested, except that of the person to whom the box or case was shipped, viz, one Mills. The wagon which brought the box or case, so far as appears, contained no other goods, and there was no explanation as to why it came there at that hour, unmarked, unweighed, and unhooped. Nor does it appear that the name of the party sending it was asked for by the defendants at any time; nor does the name of such party appear at any place in all these proceedings.

It is claimed by the defendants that the box contained thirty gallons of *nitro-glycerine*, or *glonoin oil*, and that its explosion caused the damage in question. It is also claimed by them that the contents of the box were unknown to them or those in their employ. It is in evidence that the explosion occurred while the parties were engaged in opening it with a mallet and chisel, "instantly killing all the said parties and one or two others;" but it nowhere appears that the explosion was caused by the concussion or percussion of the mallet and chisel. That is *inferred* from

the examination that was subsequently made of the chip alleged to have been saturated with the liquid, which it was said had leaked from this box, and they *called* it *nitro-glycerine;* and that agent, it is said, does not explode by the application of fire, but will explode by concussion or percussion.

"It is not dangerous from the mere application of flame, as the flame of a candle, but in explosion *combustion* takes place, and in that view it is combustible and dangerous." (Record, p. 70.)

The bill of exceptions (Record, pp. 66, 67) sets forth the clause of the lease relied on in part by plaintiff. It is as follows:

"It is likewise agreed that the said parties of the second part shall not receive in said demised premises, either for their own account or on storage, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility; that they will, during the term of this lease, occupy the premises solely for the business of their calling, to wit, banking and express office; and that they are not to underlet the same to any other person or persons for any other business in part or the whole, without the prior consent in writing of the party of the first part."

The lease in full is to be found on page 57 of the Record.

Plaintiff now comes, and for errors apparent in said Record, nominates and designates the following, viz:

1st. The court below erred in not holding, as the law of the case, that the defendants were chargeable with notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with the same.

2d. In not holding and determining, as the law of the case, that the defendants were guilty of negligence in receiving, introducing, managing, handling, moving, striking, and percussing of the said box containing said nitro-glycerine.

3d. In not holding and determining, as the law of the

case, that it was negligence in defendants in receiving said case at New York without first inquiring what its contents were, and that the circumstances under which it was delivered to defendants imposed upon them, as prudent, careful business men, due inquiry as to its contents.

4th. In not holding and determining, as the law of the case, that it was incumbent on the defendants to show that said case did not contain any article which was dangerous from combustibility.

5th. In not holding and determining that nitro-glycerine was a dangerous agent, which was liable to explode from combustion.

6th. In not holding that while nitro-glycerine is not dangerous from the mere application of flame to it, nevertheless it will explode when combustion does take place, and it always does take place in explosion, and in that view it is combustible and dangerous.

7th. In not rendering judgment for the plaintiff on the law and evidence of the case for damages sustained and established in those parts of the premises of the plaintiff described in the complaint, and not occupied by defendants, and not embraced in terms in the lease set out in the Record.

ARGUMENT.

Two questions will form the subject of discussion:

1st. The liability of defendants for damages resulting from their act as the tenants of plaintiff.

2d. Their liability for damages done to plaintiff's property not occupied by defendants, which was occasioned by their negligence.

1st. Defendants were tenants from year to year of the premises wherein the explosion occurred. (People *v.* Rickett, 8 Cowan, 230; 1 Cruise Digest, 223.)

They were holding over under the terms and covenants of the written lease, (Record, p. 57,) and were bound by its provisions in every respect. Reference may be had to

it for the purpose of determining the rights and liabilities of parties and the terms of tenancy.

Being tenants from year to year, they were bound to so use the premises as not to injure those of their neighbors, and the law, in this form of action, does not so much regard the intent of the actor as the loss and damage of the party suffering. He is held to reasonable care and precaution. (Taylor's Landlord and Tenant, sec. 197.)

There are several instances cited to illustrate the proposition. (*Ibid*, sec. 196.)

But the case cited from 21 Pick. strongly supports this principle. In that case it is decided that even if a man, acting according to the best of his skill, and with the utmost prudence, makes an improvement on his land, and not forseeing that it will produce an injury to his neighbor, unwittingly injured him, he is still answerable for the damage. The same principle is recognized and affirmed in 6 Taunton R., (p. 44;) Sutton *v.* Clark; and 1 Denio, (p. 91;) Cook *v.* The Champlain Trans. Co.

In one of these cases, cited in Taylor's Landlord and Tenant, sec. 196, it will be seen that the defendant was held for damages where it appeared that he made a rick of hay on his own land so near some cottages of the plaintiff that they were burned by the spontaneous ignition of the hay, the hay having been put up in a damp or green condition; it being well known when put up in this condition it will from natural causes ferment and ignite.

The principle here decided must control in this case. There the tenant was held liable for an injury to the reversioner under circumstances somewhat similar to those in this case. He was charged with notice of the fact that hay so put up was liable to ignite. It was the presumption of this knowledge on his part, and the placing of the hay where he did, which compelled the court to mulct him in damages. The plea of want of knowledge did not avail him.

It was the duty of defendants to know the nature of the property they were introducing into their warehouse.

They were charged with that duty, not only upon the general rule of law stated, but upon another principle no less cardinal, viz, that they were common carriers of goods for hire, occupying a part of public conveyances, wherein passengers and freight of great value were carried, the property of others, and as such held to extraordinary care and prudence in view of their extraordinary privileges. The very fact that they were permitted to handle their goods in their receipt and stowage in the vessel without reference to the stevedores and sailors of the vessel, imposed upon them the utmost good faith and diligence as to the character of the goods they shipped.

Combustible, explosive, or dangerous goods, were contraband as common freight, and in most instances strictly unlawful.

The rules of shipping, the law governing vessels seagoing, were known to the defendants, and hence imposed on them the absolute duty of knowing the general character of the goods they received at New York for shipment.

If there was no other reason why this box should have been examined in New York when presented for shipment, the rule that every person who undertakes a business in which the public is concerned is bound to conduct that business with reasonable care, and if, for want of that care, another suffer damage, the party is liable to make it good. If damage had occurred to the lives or property of others by the explosion of this box of *nitro-glycerine* on board the vessel, the defendants would have been held liable, and the excuse that they were ignorant of the contents of the box, or that they did not know the liquid therein contained was a dangerous explosive agency, would not have protected them. It was their duty to know, and in not knowing, they were criminally negligent. The act was unlawful in shipping it without informing the officers of the vessel, and they must take all the consequences of such unlawful act.

As in the case of the rick of damp hay: the fact was that it was liable to ignite, and it was negligence to put it where

it was placed. And here the fact was, that this *nitro-glycerine* was liable to explode by combustion or percussion, and it was unlawful to receive the box without a knowledge of its contents, and the defendants were charged with knowledge of its dangerous character.

In this view, it was incumbent on them to require the necessary information, as to its contents, of the person who brought the box to them. Failing to do this, they took all the risk *and became the shippers themselves.* The ship knew no one else in the transaction, and had to deal with none other than them. The defendants were their own consignees at San Francisco. They received the goods from and receipted to the party who was sending them forward to California. That act made them liable in the same manner and to the same extent as the party who delivered them the goods, and to whom they gave a receipt. There was no privity of contract between him and the ship owners. He and they were strangers. But, as between the ship owners and defendants, there was a privity of contract, and all the consequences of a direliction on the part of the defendants, in the shipment of this dangerous agent, fell on the defendants. If injury to the ship had followed from the explosion of this box, the defendants would have been liable, because they did not notify the ship owners of the character of the contents of the box.

Lord Ellenborough, in treating of the relative obligations of the shipper and ship owners, holds that inasmuch *as the shipper knows the contents*, it is incumbent on him to disclose their character, and his failure to do so makes him liable for the damages, and he says:

"In order to make the putting on board wrongful, the defendant must be conusant of the dangerous quality of the article put on board; and, if being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous articles on board, for which they are criminally liable and punishable as for a misdeamenor at least." (Williams *v.* The East India Company, 3 East, 201.)

And so again, in Farrant *v.* Barnes, Scott's Com. Bench R., (N. S.,) p. 564, the court says:

"The case of the shipment of dangerous goods may be an extreme case; but it serves to illustrate the general principle, that wherever a person employs another to carry an article which, from its dangerous character, requires more than ordinary care, he must give him reasonable notice of the nature of the article, and that if he fails to do so, he is responsible for the probable consequences of the neglect."

If this were a suit brought by the owners of the vessel against the defendants for damages done to it by the explosion of the box, there would be no doubt of the correctness of the application of this rule.

Is there any difference in principle between this case and those from which we have just quoted?

Here the defendants have the same relation to the box of nitro-glycerine as if they were the packers and shippers of it in the first instance. They assumed to be the shippers. They occupied the position of shippers. They are presumed to have known the character of the contents of the box equally as well as the packers or the party who delivered it to them. They are bound to all his obligations, and responsible for all losses or damages, as he would have been had *he* shipped it on the vessel, instead of delivering it to them for shipment.

The case in 6 Ellis & Blackburn, (p. 470,) Brass v. Maitland, is in point, as showing the consequences to the shipper for not disclosing the contents.

The very fact that the ship cannot conveniently inquire into the character of all the goods shipped shows the necessity and reason of the rule, that the shipper should be held to accountability for not making known the existence and character of dangerous goods amongst his freight.

It is not a case of flagrant wrong, but a case of negligence. The sound maxim is, that "the hirer of anything must use it in a lawful manner and according to the purpose for which it is let." Lord Tenterden, in Abbott on

Shipping, in the chapter on shipping, where he treats of the general duties of the merchant, lays down the general doctrine thus:

"And also the merchant must lade no prohibited or uncustomed goods by which the ship may be subject to detention or forfeiture. *Pari ratione*, the merchant must not lade goods of a dangerous nature, which the master and those employed in the navigation of the ship have no means of knowing to be of a dangerous nature, without giving notice of their nature, so that the master and those employed in the navigation of the ship may exercise an option to refuse to accept them, and, if accepted, may stow them where they will not endanger the rest of the cargo." (Brass *v.* Maitland, 88 Eng. Com. Law, p. 485.)

So, in Farrant *v.* Barnes, 103 Eng. Com. Law, p. 560, Chief Justice Earle says:

"The application to the plaintiff being an application to take charge of and to carry and deliver a dangerous article, it was the duty of the defendant, who knew the danger, to take care that the dangerous character of the article should be made known to all persons who must be concerned in the carriage of it."

Now, the introduction of this dangerous compound into the premises of the plaintiff was in violation of the covenant of the lease, and all damages sustained by the plaintiff are recoverable.

It matters not whether they appertain to the demised premises or those contiguous to them. The premises occupied by defendants and the other tenants of plaintiff were so constructed as that such an explosion must necessarily damage all more or less. As if the effect of the explosion had been to fire the premises occupied by defendant, and they had been destroyed. The same fate would have befallen the others. The covenant was made to prevent injury to the property of plaintiff by the introduction of these dangerous agencies.

Owing to the peculiar manner in which these premises were constructed, a fact known to the defendants when they made the covenant, the covenant applied to them all,

and was so intended by the parties. They contracted with the view to their then status. The interests of plaintiff were known to be in each and all, and that he was guarding against the introduction on the premises of those agencies which might work this extensive injury to all of this property. Whether aware of the contents of the box and their dangerous character or not, its introduction was in violation of this covenant. Knowledge of the compound does not enter into the case.

The fact that it was dangerous, and was introduced by the defendants, are sufficient to make the defendants liable for all the damage which plaintiff sustained. It was unlawful and contrary to contract that they should introduce it into the premises at all. Having done so, their liabilities follow.

The record finds that in explosion combustion does take place in *nitro-glycerine*. It is thus ascertained to be a dangerous article, from its combustible character. Without combustion it will not explode, but with combustion it will explode.

It thus becomes one of the contraband articles. So that, if it was *nitro-glycerine*, it contained the properties which rendered it dangerous, and brought it within the very terms of the covenant. (Rec., p. 57.)

Glycerine is formed of fatty substances, consisting of hydrogen, carbon, and oxygen. Carbon *is* combustible; hydrogen inflammable; and oxygen, *when combined with other bodies*, will produce *combustion*.

But the defendants had notice of the contents of the box. Adverting to the rule we have already considered, defendants, being the shippers, were bound to know what the contents were, and are liable for all the consequences. If they did not inquire of the parties who delivered the box to their servants, it was because they were satisfied with the knowledge they already had.

According to Lord Ellenborough, (in Williams *v.* The East India Insurance Co., 3 East R., p. 192,) the burden

of proof, to show that they did not know the contents, was on them after its dangerous character is shown.

It is exactly such a case as will be controlled by the rule, which declares that where the duty devolved upon a party is fixed by law, he shall be put to the proof of showing that he did do his duty in that particular.

If the law imposed upon the defendants the duty of knowing the character of the contents of the box, they must suffer the consequences of their neglect to communicate it. So their introduction of it into the premises of plaintiff was unlawful in the light of the covenant of the lease.

Being charged with notice of the contents at New York, all the consequences of that knowledge followed them to San Francisco, and attached to their act of introducing it into the warehouse of plaintiff.

Thus we have demonstrated that they were liable to plaintiff under this covenant without knowledge of the contents of the box and also *with* knowledge of the contents.

2d. But they are also liable to plaintiff for the damage done to the tenements occupied by other tenants in the same building or structure, which, like those occupied by defendants, were owned in fee by plaintiff and under one common roof. It was unlawful for defendants to introduce this dangerous compound into their premises, because it was an unlawful use of their own property, and all injury that did ensue therefrom to their neighbors, the defendants must respond in proper damages for.

1st. The general rule is that every man shall so use his own property that no injury thereby will come to his neighbor. He shall use prudence and care in the management of it, that others may be shielded from harm or injury by reason of his failure to exercise prudence and care; but, should an injury result to his neighbor in consequence of his careless management of his property, he will be made to answer in damages.

The cases of the ignition of a rick of hay by combustion, (hereinbefore cited,) and the burning of the plaintiff's house by fire from the smoke stack of defendant's steamer, (1 Denio, 91, Cook *v.* Champlain Trans. Co.,) are in point and sufficiently illustrative. In the one the defendant stacked his hay in a green condition and combustion occurred, destroying plaintiff's house; and in the other the plaintiff constructed his house so near the water's edge, but on his own land, as that the cinders or flames from the smoke-stack of defendant's steamer, in passing over the usual route, set fire to the house and destroyed it.

These are extreme cases, but in both substantial damages were allowed. The principle recognized was, that the defendants *might* have prevented the accidents by the exercise of ordinary care and prudence in the management of their own property. This doctrine has never been controverted or denied, so far as the history of modern judicature discloses, but it has been continuously, from the time of its pronouncement to the present, advocated and judicially followed as the proper and just rule.

We might multiply cases illustrative of this rule of law, to show that, while the defendants are not held to extraordinary care and prudence in their dealings, they are obligated to observe and exercise the usual and necessary precautionary and prudential steps which should govern the conduct of every one. They must not lose sight of the rights of others, and mere ignorance of the *effect* of the act will not excuse them. What is known to others, even although not of universal notoriety, the defendants are presumed to be conversant of. They shall be held to strict accountability if they fail to exercise prudence in every step. If they *might* know the character of property intrusted to them (and this was their easy and absolute duty) by simple inquiry, and they fail to make that inquiry, they must suffer the consequences of such neglect.

But this liability is increased many fold where the established circumstances show that there was anything, how-

ever slight, which suggested inquiry. They must not shut their eyes to surrounding circumstances.

Their duty is a grave one. Not only are they required to act in good faith with the ship in which they are transporting goods, but they are held to a rigid duty with respect to the character of the goods they ship.

Public policy would demand the establishment and enforcement of such a reasonable and salutary rule, where so many lives and so much valuable property are involved and liable to destruction by the introduction of dangerous compounds.

Since the formation of express companies a new method of shipping goods has been adopted, whereby the old custom of executing bills of lading by the ship, in the name of and to each individual shipper as well as the consignee, is abrogated, so far as the carriage of goods by these corporations is concerned, by those companies undertaking that duty in their own names, and on their own corporate responsibility, without regard to the ship or ship owners. They assume the liabilities of the ship owners for the goods shipped; and all the consequences of dereliction following the shipment of improper or contraband articles rest upon them. The authorities already cited under the first point settle this. Hence the necessity that the public should be protected against the negligence, or, as Lord Ellenborough calls it, "the criminal negligence," of these companies. If it would have been negligence in the ship to take this box, under the circumstances, without inqiury, it was doubly so on the part of these defendants, because they were not only the shippers, but the carriers. There was nobody behind them to hold responsible for the damages. They are substituted for and occupy the position of both shippers and carriers, and thus assume all the respnsibility and become liable for all the damages of both, where accident occurs. They impose upon themselves extraordinary diligence, care, and good faith.

By reason of this great trust and confidence, they can receive and ship what they please in the space allotted to

them in the conveyance, without supervision, and are consequently held to the strictest good faith. They will not be permitted to shield themselves behind the rule that might apply to them were they mere carriers without notice.

The defence relies on this rule to exonerate themselves. But its applicability is not apparent in this case. We opine that the court will, the rather, incline to apply that rule which imposes the obligation upon shippers to disclose the character of freight which the law says is dangerous, illegal, and contraband.

If, however, they are not to be held to the most rigid accountability for so inexcusable and unjustifiable an infraction of this law, which alike protects and permits their corporate existence, as would be the ship owners in the carriage of such dangerous freight, then is their liability complete and absolute, because they were sufficiently notified to put them upon inquiry.

1st. The box was delivered at the dock of defendants, in New York, at an unseasonable hour and day, and this fact was remarked upon by the agent of defendants, who likewise called attention to the unsafe condition or fastenings of the box. Assuming that the deliverer was ignorant of the company's rules or regulations, the courts will presume that defendant's agent was versed and practiced in them, and that he was conscious of their violation when he received and receipted for this box. There was no explanation offered as to why the box was brought there at that improper time, nor was any question asked.

2d. The name of the party who delivered the box was not given, and, so far as the bill of exceptions or the finding of the court disclose, it was not asked for.

3d. Neither was the box strapped, marked, or weighed. But, even if the man who received it was but newly installed and inexperienced, and so ignorant that he did not understand the rules, the box remained with the company for some days before the deliverer called for his regular receipt, and thus there was ample time for the facts to be reported to the officers by the party who acted for the com-

pany in the receipt of it, in order that he might be instructed as to his course when the deliverer called again. But the shipping clerk, who, we take it, was an intelligent man and understood the rules, in the face of these suspicious circumstances, gave the company's regular receipt for the box to the party when he called, some days after leaving it.

Had these facts been reported to the officers, it is not at all impossible that the nature of the contents of this box would have been carefully inquired into.

Each of these omissions was a violation of the *rules* of the company, as the court find. Certainly they were, taken together, very extraordinary, and therefore suspicious, because unusual circumstances, which should have put the defendants upon inquiry. That they did not inquire is only a fact which shows gross neglect on their part. There is not an extenuating circumstance in this transaction that the defendants can interpose; but, on the contrary, culpability marks every step. The box contained a dangerous compound as the sequel showed, and they *might* have ascertained that fact beforehand had they exercised the precaution which these circumstances suggested. It was something within their power and province. Their neglect cannot be excused upon the ground that they would not have known had they examined the box; because if it had proved an unknown article of commerce, they must have refused it. It was within their power to have had it examined by those skilled in the knowledge of such compounds. According to the findings and the bill of exceptions this compound was known as a dangerous agent sometime before, more powerful than gunpowder and more destructive. Its discovery was announced in 1847 in Paris, France, and again in 1848 and 1849 in Philadelphia. "Thereafter it was experimented with by various chemists." In 1864 it was proposed by Noble, in England, for blasting purposes, and to some extent used in some of the mines for blasting. He published a pamphlet in 1865 setting forth its qualities; also in the "Scientific American," a weekly publication, published in New York.

In December, 1865, an accidental explosion of *nitro-glycerine* occurred in a hotel in New York city, which was mentioned in the New York papers of that day. It was known in San Francisco as a blasting agent in 1865; and in December of that year the public attention was called to it as a blasting agent, in two articles illustrating with cuts the mode of using it, and giving testimony of its extraordinary explosive force, &c. The defendants were subscribers to the paper containing these articles and cuts. (Rec., pp. 70, 71.)

These facts cannot fail to show that this article was widely enough advertised to inform defendants of its dangerous character. That they did not know it will not excuse them. Had they but resorted to the usual precautionary measures that their business demanded of them as careful men, they could have known all about it.

At New York it had already formed the subject of scientific investigation; it was known to be dangerous; it had demonstrated its dangerous character by the explosion in New York in 1865. (Rec., p. 62.) It was the subject of commerce between Hamburg and San Francisco, and a quantity of it was at that time in the city of San Francisco, and had been experimented with there. It is not easy to escape the conviction that this compound was well known in California, and more especially among those who were engaged in supplying mines with goods from distant points to aid in their business. Defendants were so engaged constantly.

The bill of exceptions and findings say that their express business extended to the territories and the Pacific States, &c. (Rec., p. 59.)

Thus showing how much interested they were in knowing the nature of the goods which such customers of the defendants required, and how natural it was that they should know and understand the properties of this new blasting agent.

It was, therefore, carelessness in the defendants not to inform themselves of the contents of that box.

Now, its introduction into the premises, and the reckless

handling of it by their agents, was a species of carelessness wholly unjustifiable and indefensible.

An examination of the chips at the time, which were afterwards found saturated with the liquid, would have informed them. It was their duty to have had the liquid examined ere they allowed the box to be introduced into the premises of the plaintiff. It is claimed they were unacquainted with its quality, yet they saw it as it exuded from the box while on the wharf; for it is in evidence that its appearance was that of sweet or salad oil. (Rec., p. 61.

It was then and there their duty to have had it examined and its properties ascertained, more particularly in the presence of the fact that they were unacquainted with the contents of the box, and that *nitro-glycerine* was then being transmitted by ships to California, and was a known dangerous agent.

They had no right to experiment with it in the bungling manner in which they did. It was as much their duty to ascertain what its contents were before they attempted to open it as it was to do so afterwards. The opportunity to examine it before was better. It was gross neglect to omit that duty then, and therefore its introduction into the premises, and the awkward manner in which it was afterwards handled, was unlawful, because it was gross carelessness.

It must all the while be borne in mind that there is no evidence of the contents of this box, except what was afforded by the experiment with some of the liquid found on the chip.

The name of the party who brought or sent it to the ship nowhere appears, thus leaving defendants without means of ascertaining the contents of the case, except by experiment at New York and San Francisco, at which latter place the liquid was found to be escaping from the box. Both these opportunities were disregarded. We submit that no more flagrant instance of carelessness can be found: certainly none is afforded in the books.

The case of the shipment of a dangerous corrosive substance, under the name of bleaching powders, reported

in 88 E. C. L., is not so extreme as this. (Brass *v.* Waitland, 740.)

It will not avail to say that the defendant could not refuse to take the goods. That is exactly what they might lawfully have done here. The box was not done up for shipment according to their rules, but was so imperfectly prepared and insecurely fastened as to excite suspicion. But it was received as a matter of favor, and to enable the company's employé to make a fee out of the cartman.

It is to be remembered that cartmen are not in the habit of paying for that kind of work without previous instructions and indemnity from the owner of the goods.

There was every sign of deliberation in sending this box in the shape and manner it was sent, and a purpose to have it taken *out of time* and from the cartman, who could give no evidence of its contents.

Every circumstance connected with it was so unusual as to attract attention, and should have put any prudent man on his guard. But for the fee offered for the strapping, &c., of the box, it is probable it would not have been received, and this terrible accident would not have occurred. The receiving of it under the circumstances was irregular and unlawful.

The judgment of the court is attempted to be sustained by the statement of the evidence, not only in that paper, but in the bill of exceptions.

The findings are like a special verdict, with which is reported the evidence upon which it is founded. But the record goes further. It shows that the court, upon the presentation of certain facts, rules certain propositions of law, and reports the facts to which such rulings of law appertained. Thus the questions are brought fairly before the court, and may be intelligently considered. Every question presented in this brief was raised below, and is in the record noted as excepted to; and the bill of exceptions contains all the evidence. (Rec., p. 66.)

On the whole, we submit that the judgment should be reversed.

R. M. Corwine,
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No. 403.

IN THE SUPREME COURT

OF THE

UNITED STATES.

John Parrott,

Plaintiff in Error,

VS.

D. N. Barney et al.

Defendants in Error.

Points and Authorities of Defendants in Error.

S. M. WILSON, and
W. W. COPE,
Counsel for Defendants in Error.

BACON & COMPANY
BOOK & JOB PRINTERS
SAN FRANCISCO, CAL.

IN THE SUPREME COURT

OF THE

UNITED STATES.

JOHN PARROTT,
Plaintiff in Error,

vs.

D. N. BARNEY ET ALS.,
Defendants in Error

No. 403.

Error to the Circuit Court of the United States for the Ninth Circuit, in and for the District of California.

Brief and Points of the Defendants in Error.

FACTS OF THE CASE.

This action was brought by the plaintiff in error, to recover damages for injuries to his buildings in the city of San Francisco, caused by the explosion of nitro-glycerine, whilst in the custody of the defendants Wells, Fargo & Co., the well known express

company. A part of the premises injured, was leased by the defendants in error from the plaintiff in error, but other portions of the premises were lease by the plaintiff to other tenants. Immediately after the accident the defendants repaired the premises demised to them, and such repairs were not only made under the sanction of the plaintiff, but the premises were placed in better condition than before the accident. The defendants paid, as they supposed, all the expenses of this repair (about six thousand dollars) but it appeared in the evidence that by mistake a part of this expense, (one thousand seven hundred and eighty-seven dollars) intended to be met by defendants, was paid by plaintiff in settling for the repairs on his other buildings. For this latter amount, under the first count of the complaint, the Circuit Court rendered judgment, adding interest and costs; on the ground, that the injury to the premises demised to defendants was technically *waste* as between landlord and tenant. To this the defendants make no exception, and but for the mistake, would have paid it originally.

The Circuit Court however rendered judgment for the defendants, so far as the other causes of action were concerned; or in other words, found that the defendants were faultless and free from negligence, and were therefore not liable for the damages to such of the property of the plaintiff as he had demised to other tenants.

This is the sole error relied on by the plaintiff.

The "findings of fact" by the Circuit Court are very full and clear, and but a partial statement here is necessary.

The premises in which the accident occurred were the premises leased by defendants from the plaintiff. Their business, as bankers and expressmen, is not only recited in the lease, but by its terms they were bound to conduct those branches of business in the demised premises.

"An ordinary wooden box, used for shipping goods in, apparently two and one-half feet square by three feet long," was received in the usual course of business by the employees of defendants, at New York City, to be carried by them to Los Angeles, California, *via* Panama and San Francisco. It was received and carried to the latter city with several thousand other cases of like general appearance. No information was given as to its contents; there was nothing to attract attention to it; there was no knowledge or suspicion on the part of the defendants or their workmen, as to what it contained. When it was landed on the wharf at San Francisco, it was discovered that the contents were leaking, and seemed to be oil, of the general appearance of sweet oil. Another box, of similar appearance, was damaged by this leaking, and the two boxes were taken, according to the custom of many years standing, to the business

house of defendants (being the premises demised of plaintiff), for examination, and with a view to ascertain the damage. The agents of the Pacific Mail Steamship Co. were requested to send a representative to be present at the examination, so that an adjustment might be made, at once, between the Express Company, the Steamship Company (who had carried the goods for the Express Company), and the owner of the cases.

Immediately afterwards, the box from which the substance was leaking was opened by a porter with mallet and chisel, in the usual way, when an explosion occurred which not only killed the several men present, but occasioned the destruction of a large amount of property, including that of the plaintiff in error.

It was subsequently discovered that this box contained the article called nitro-glycerine, or glonoin oil. The other box contained silver-ware.

Nitro-glycerine at that time was unknown to commerce. The knowledge of it was almost exclusively confined to the chemical laboratory. Men engaged in shipping would not have known its character, had the name been printed on the top of the case containing it; and but little was known of it even by chemists. The explosion at Aspinwall, occurring about one week prior to that at San Francisco (the news of which had not then reached the latter city), and others at Sydney and in England, as

well as the one in San Francisco, attracted the attention of chemists to it, and for the first time its nature was fully understood. Prior to that time, it had been, when freshly made, subjected to many experiments with impunity. If a flame were brought in contact with it, it would burn slowly, without exploding, and if the flame were withdrawn it would cease to burn; if red hot iron were inserted in it, no effect was produced. The usual mode of causing an explosion is by percussion; and to effect it, the powder used for the purpose must not be placed on the surface, but inserted in the body of the nitro-glycerine, so that the bulk itself be disturbed.

It was therefore, seemingly, an article capable of being carried or used with great safety; but the dreadful accidents above referred to led to a thorough examination of its nature, and it was discovered that, however pure it might be made, it would in time spontaneously decompose; and that when kept in closed vessels the decomposition would generate gases, the pressure of which would alone, in time, produce a spontaneous explosion. In this condition of partial decomposition acting by way of pressure from within, and the chisel and mallet producing a force from without, the explosion occurred. Other peculiarities and qualities of nitro-glycerine, and a brief history of it, are contained in the record.

The Circuit Court held that "There was no negligence on the part of the defendants in receiving said package, or in their failure to ascertain the dangerous character of the contents; or, in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable grounds of suspicion, no negligence in the handling of said package at the time of the explosion."

The defendants are sought to be held liable on two grounds; *first*, negligence, which is the gravamen of the second and third counts of the complaint; *second*, that under the *fourth count*, which is trespass *vi et armis*, the defendants are liable for their acts, though not guilty of negligence.

POINTS.

I.

Can the question of negligence be inquired into here?

Under the Act of Congress, of March 3rd, 1865, (13 Stat. at Large, 501, sec. 4) a jury in this cause was waived, and the trial had before the Court. The "Findings of Fact," and "Conclusions of Law" by the Court are contained in the record (pp. 58 et seq. and 64) and form part of the judgment-roll, (see page 66.) The Court finds *as a fact*, as

shown above, that defendants were not guilty of negligence, (pg. 64.)

Negligence is sometimes said to be a question of fact, and sometimes "one of mingled law and fact," but, in either view, must be submitted to the jury, or, when the jury is waived, to the Court in view of its performing the functions of a jury.

Foot vs. *Wiswall*, 14 John. 304.
Phil. & Reading R. Co. vs. *Spearm*, 47 *Penn. St.* 300.
Beers vs. *Housatonic R. Co.*, 19 Conn. 566,
Monroe vs. *Leach*, 7 Metc. 274.
Galena & Chi. R. Co. vs. *Yarwood*, 17 Ill. 509–519. *Same* vs. *Dill*, 22 Ill. 264.
Bernhardt vs. *Rensaleer & Sar. R. R. Co.*, 32 *Barb.* 165.

It was held, in such a case, before the Statute referred to, that there being no exception as to the sufficiency of the evidence to justify the finding, the question of negligence could not be raised here.

See *Cuculler* vs. *Emerling*, 22 Howard, 83.
Providence vs. *Babcock*, 3 Wall. 240.

Also, that no error can be assigned on a question of fact; the decision of the Court upon the facts is as conclusive as the verdict of a jury.

Bond vs. *Brown*, 12 How. 254.

But the above statute does not allow any question to be raised as to the sufficiency of the facts to support the finding.

II.

Were defendants guilty of negligence?

If this question is properly raised on the record, we may inquire what facts are relied on to show that the defendants were negligent? From the bill of exceptions we learn (page72) that no actual culpability or fault is relied on as manifesting negligence. On the contrary, it is claimed that negligence existed by reason of an arbitrary rule of law, within which the case falls—in other words, that "the defendants were chargeable with notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with the same," and following as a corollary, "that the defendants were guilty of negligence in receiving, introducing, managing, handling, moving, opening, striking and percussing of the said box containing said nitroglycerine."

The Hon. Circuit Court ruled to the contrary of these propositions, and found as facts (pg. 71) that "neither the defendants nor any of the employees of the defendants, nor of the Pacific Mail Steam-

ship Company, who had anything to do with the package in question, nor the managing agent of the defendants on the Pacific coast, nor any of those killed by the explosion, knew the contents of the case in question, or had any means of such knowledge, other than herein stated, or had any reason to suspect its dangerous character, nor did they know anything about nitro-glycerine, or glonoin oil, or that it was dangerous."

We know of no artificial or arbitrary rule charging a common carrier with constructive notice of the contents or qualities of packages in their custody.

The defendants, as common carriers, had no right to know the contents of cases delivered them to carry, and could not refuse to take them because information as to the contents should be refused.

Crouch vs. *The London & N. W. R. W. Co.*, 14 Com. Bench, 256-291-294, (78 E. C. L. 254.)

Bills of Lading very frequently describe the contents of packages as unknown.

Abbott on Ship., 339.

It is not a duty incumbent on the carrier to ask the contents in cases free from suspicion. "It would be strange to suppose that the master or mate, having no reason to suspect that goods of-

fered to him for a general ship may not safely be stowed away in the hold, must ask every shipper the contents of every package."

Lord Campbell in *Brass* vs. *Maitland*, 6 El. and B. 482 (88 E. C. L.)

It is held in this case to be the duty of the shipper to give notice, if the contents of the packages are dangerous. Crompton, J., in that case held that the shipper would not be liable unless he himself knew the dangerous nature of the article shipped. His views are approved by the Court in

Hutchinson vs. *Guion*, 5 Com. B. 162–3 (94 E. C. L.)

In *Pierce* vs. *Winston*, (2 Sprague's Dec. 35) the opinion of Lord Campbell (in *Brass* vs. *Maitland*) was followed, that the mere shipment itself created an implied covenant on the part of the shipper with the carrier that the goods were not dangerous.

That the shipper must himself give the notice of dangerous articles, and is guilty of a breach of duty, if not crime, in omitting to give the notice, is maintained in various other cases.

Tarrant vs. *Barnes*, 11 Com. B. 561, (103 E. C. L.)

Williams vs. *East Ind. Co.*, 3 East. 192.

Shear and Red. on Neg. 232.

Bailey vs. *Merrill*, 3 Bulstr. 94.

Longmeid vs. *Holliday*, 6 Eng. L. and Eq. 566.

The same principle has been applied to a druggist labeling medicine wrongly ; and innocent parties acting on the label, held not liable for injuries.

Thomas vs. *Winchester*, 6 N. Y. R. 409.

The carrier being obliged to carry all goods presented, and having no right to know the contents, and the refusal to give information being no defense to the carrier in an action for refusal to carry, resort in England has been had to legislation. By the 105th section of 8 and 9 Vict. c. 20, carriers may refuse to take any parcel they suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact.

Crouch vs. *L. & N. W. R. W. Co.* 14 Com. B. 295, (78 E. C. L. 254.)

The defendants here had nothing whatever to warn them of the dangerous nature of the box. The witness O'Leary, who was present when the box was first left on the wharf in New York, and also when the receipt was given for it, obtained no information himself as to its contents when first left, and heard all that took place between the shipper and Middlebrook, who receipted for the box when it was received. No statement of its contents was made by the shipper. Middlebrook really received the box. The other clerk, who subsequently took up the receipt of Middlebrook

and gave an express receipt, had nothing to do with receiving the box. The express receipt which he gave was made up exclusively from Middlebrook's receipt, which was the only original paper. From it was also made up the way-bill, manifest, etc. The finding is direct, that no notice was given to the defendants of the contents of the box, and that there was nothing to create any impression that it was dangerous. They had a right to assume that it was safe and ordinary merchandise.

"In the exercise of his lawful rights every man has a right to act on the belief that every other person will perform his duty and obey the law; *and it is not negligence to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person.*"

Jetter vs. *N. Y. & Har. R. R.*, 2 Keys, N. Y. R. 154.

Earhart vs. *Youngblood*, 27 Penn. St. R. 323.

Curtis vs. *Mills*, 5 Car. & P. 489.

Deyo vs. *N. Y. Cent. R. R.* 34, N. Y. R. 9.

The lease from the plaintiff required the defendants to carry on the express business on the demised premises, and implied that it should be done according to the known laws and usages of the trade. They could, therefore, only be liable for *knowingly* introducing into the premises dangerous

articles. A *scienter* would be necessary to a cause of action against them.

Curtis vs. *Mills*, 5 Car. & P. 491, (24 Eng. C. L.) and cases cited in note.

Spencer vs. *Campbell*, 9 Watts and Searg. 32.

Shear and Red. on Neg., 219-20, and cases cited.

Chandwick vs. *Trower*, 6 Bing. N. C. I. (37 E. C. L. 259.)

"A demise of a brewery would carry with it the right to use the premises for a brewery, although it might be a nuisance to the lessor or his assigns. So, if a mill were demised, the lessee would have the right to grind there, although the noise might annoy the lessor or his assigns." These principles were applied to premises leased for bleaching, etc. The result of the use of the premises permitted gives no cause of action.

Hall vs. *Land*, 1 Hurl. & Colt (Exch.) 676.

Jackson vs. *Andrews*, 18 Johns. 434.

"The tenant, in doing an act proper in itself, cannot be a wrongdoer by a consequence which he could not anticipate or foresee."

Jackson vs. *Andrew*, 18 Johns. R. 434.

1 Hilliard on Realty, 266.

Panton vs. *Holland*, 17 Johns. 100.

"It is a general rule of the English law, that no

man can maintain an action for a wrong where he has consented to the act which occasioned the loss."

Brown's Legal Max. 246.

Gould vs. *Oliver*, 4 Bing. 134, (33 E. C. L. R. 305.)

Degg vs. *Midland R. Co.*, 1 Hurl. & Nor. 780.

The landlord took the risk incident to the business (referred to in his lease) as an employé does.

Hutchinson vs. *Railway Co.*, 5 Ex. R. 351.

Wiggett vs. *Fox*, 11 Id. 832.

Degg vs. *Midland R. Co.*, 1 Hurl. & Nor. 780.

The defendants here being innocently ignorant of the contents of the case, received in due course of trade, were not guilty of negligence in treating it in the usual and customary way in which packages of a similar appearance were treated.

"Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Moreover, it is not absolute or intrinsic, but always relative to some circumstance of time, place, or person." (Brown's Legal Max. 329.)

Richardson vs. *Kier*, 24 Cal. 75.

Shear and Red. on Neg., 1–2, *et seq.*

"The mere fact of injury having been suffered

is not enough to establish a charge of negligence. No one is responsible for an injury caused purely by inevitable accident, while he is engaged in lawful business, even though the injury was the direct consequence of his own act, and the injured party was at the time lawfully employed, and in all respects free from fault. * * * The law makes no unreasonable demand. It does not require from any man superhuman wisdom or foresight. *Therefore no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances.*"

Shear & Red. on Neg., 3-5 *et seq.*, Chap. I.

"*The burden of proof*, in an action upon negligence, always rests upon the party charging it, whom, for convenience, we may assume to be, as he almost invariably is, the plaintiff in the action. It is not enough for him to prove that he has suffered loss by the act or omission of the defendant. He must also prove that the defendant in such act, or omission, violated a duty resting upon him."

Shear & Red. on Neg., Sec. 12, and cases cited.

In 2 Greenl. Ev., Sec. 85, *et seq.*, the matter is treated fully, and the rule laid down that "the plaintiff must come prepared with evidence to

show *either that the intention was unlawful*, or *that the defendant was in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable."

See also *Brown* vs. *Kendal*, 6 Cush. 295, 297.
Cockwood vs. *Wilson*, 11 Id. 226.
1 Hilliard on Torts, 128, *et seq.*
Batcheldor vs. *Cushman*, 6 Shep. 34.

The cases between passengers and carriers for injuries are exceptions as to the *onus probandi*. The contract of the carrier being to carry the passenger safely, the proof of the injury (or that he was not carried safely) makes a *prima facie* case, which the carrier must overcome by proof. "But where no such special relation exists, the presumption is that the defendant has complied with all the obligations which may rest equally upon every man; and if he has not, the plaintiff must prove it." So such cases against carriers are not of any weight upon the questions involved in this case.

Shear & Red. on Neg., 11–10, Sec. 12.

The principle involved here, is that embodied in the maxim,

"*Sic utere tuo ut alienum non lædas.*"

In commenting on this maxim, the Supreme Court of California has held that it "does not make a man responsible for every injury which may arise

to another from the use which the first may make of his property. It would be an intolerable hardship to hold a man responsible for unavoidable accidents which may occur to his property by fires or casualties, or acts beyond his control, though others are likewise injured. The degree of negligence which will subject the owner to liability in such cases has been settled by repeated decisions."

Hoffman vs. *Tuolumne Co. W. Co.*, 10 Cal. 417, and cases there cited.

These principles are maintained, and the measure of care defined to be that which a discreet person would use if the whole risk were his own, with great uniformity in many cases.

Todd vs. *Cochill*, 17 Cal. 27.
Tenney vs. *Miners Ditch Co.*, 7 Cal. 335.
Wolf vs. *St. Louis W. Co.*, 10 Cal. 541.
Campbell vs. *Bear Riv. & N. W. W.*, 35 Cal. 679.
Gibson vs. *Puchta*, 33 Cal. 316.
Richardson vs. *Keir*, 34 Cal. 74, 75.
Panton vs. *Holland*, 17 John. R. 100.
Platt vs. *Johnson*, 15 *Ib.* 213.
Thurston vs. *Hancock et al.*, 12 Mass. 220.
1 Hilliard on Torts, 128 *et seq.*
Livingston vs. *Adam et al.*, 8 Cow. 176–7.
Pixley vs. *Clark*, 32 Barb.

In *Durham* vs. *Musselman*, (2 Blackf. 97) the

maxim "*sic utere*," etc., is treated as follows: "A man should so use his own property as not to injure the property of another. But this principle of common justice does not render a man liable, as a matter of course, for every injury another may sustain from his use of his own property. * * When the injury is accidental, the liability of the actor must depend on the degree of probability there was that such an event would be produced by the act."

Most of the cases above referred to arise in the use of *water* in reservoirs, dams, etc.

The same rule has been held in reference to *fire* originating in one man's place, and extending to and destroying the property of another. In such cases the issue is the defendant's negligence, or want of due care, the *onus probandi* being always on the plaintiff, and the measure of care that above defined.

Clark vs. *Foot*, 8 Johns. 421.
Stuart vs. *Hawley*, 22 Barb. 620.
1 Washb. on Realty, 177, and cases cited.
Bizzle vs. *Broker*, 16 Ark. 309, 320 to 328.
De France vs. *Spencer*, 2 G. Green's Rep. (Iowa) 463.
Bacheldor vs. *Heagan*, 18 Maine, 34.
Grannis vs. *Cummings*, 25 Conn. 170.
Miller vs. *Martin*, 16 Missouri, 510.
Maull vs. Wilson et al., 2 Harring. 443.

Macon R. R. Co. vs. *McConnell*, 27 Geo. R. 481.

Baltimore R. R. Co. vs. *Woodruff*, 4 Maryland R. 242.

The same rule has been applied to cases of injuries through fire, ignited by sparks from steamboats or locomotives.

See *Aldridge* vs. *Great W. R. R. Co.*, 3 Man. & Gr. 523 (42 E. C. L. 276); cited and approved in *Tenney* vs. *Mining Ditch Co.*, 7 Cal. 320.

Gerke vs. *Cal. Nav. Co.*, 9 Cal. 256.

Rood vs. *N. Y. & E. R. R. Co.*, 18 Barb. 89.

Haylett vs. *Phil. & Reading R. R. Co.*, 22 Penn. St. R. 373.

Hull vs. *Sac. Val. R. R. Co.*, 14 Cal. R. 388.

Ellis vs. *P & R. R. Co.*, 2 Iredell, 140.

Herring vs. *R. R. R. Co.*, 10 Iredell, 406.

Piggott vs. *Eastern Co. R. R.*, 54 Eng C. L. R. 233.

McCready vs. *Railroad Co.*, 2 Strob. (Law) 358.

Burroughs vs. *Housatonic R. R. Co.*, 15 Conn. 124.

Rood vs. *Erie R. R. Co.*, 18 Barb. 80.

Sheldon vs. *Hud. R. R.*, 14 N. Y. Rep. 218.

Piggott vs. *Eastern Co. R. R. Co.*, 54 Eng. C. L. R. 233.

Vaughn vs. *Taff Vale R. Co.*, 5 Hurl. & N. 679.

Averett vs. *Murrill*, 4 Jones' Law R. 324.

The same rule has also been applied to injuries by horses running away—the question always being one of negligence, measured by ordinary human prudence.

McCahill vs. *Kipp*, 3 E. D. Smith, 411.

Hall vs. *Fearnly*, 3 Ad. & El. N. S. 919 [43 E. C. L. 1037.]

Gibbon vs. *Popper*, 2 Salk. 637.

Wakeman vs. *Robinson*, 1 Bing. 213 [8 Eng. C. L. 479.]

The same principle has been applied to injuries caused by blasting rocks.

Driscoll, Adm. vs. *Newark & C. Lime, etc , Co.*, 37 N. Y. R. 637

Also to collisions by boats.

Davis vs. *Saunders*, 2 Chitty R. 639 [18 E. C. L. 825.]

Dygert vs. *Bradley*, 8 Wend. 472.

The general principle is no where more clearly laid down than in *Ellis* vs. *P. & R. Railway Co.*, [2 Iredell R. 140] approved by the Supreme Court of California in *Hull* vs. *The Sac. Val. R. R. Co.*, 14 Cal. 388.

"It is no doubt a principle of law, as it is of morals, that one should so use his own as not to injure his neighbor, and this rule requires that, even in the legitimate enjoyment of property, such care shall be used as not to render it likely to impair their enjoyment of property by others. But no man, unless he becomes insurer, or the very nature of his undertaking makes him an insurer against *unavoidable accidents*, is responsible for damages sustained against his will and without his fault."

See also *Wakeman* vs. *Robinson*, 1 Bing. 213 [8 E. C. L. 478.]

Plucknell vs. *Wilson*, 5 C. & P. 375, [24 E. C. L., 612.]

"When we speak of an *unavoidable accident* in legal phraseology, we do not mean an accident which it was physically impossible, in the nature of things, for the defendant to have prevented; all that is meant is, that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise."

Dygert vs. *Bradley*, 8 Wend. 472.

Shaw, C. J., in *Brown* vs. *Kendall*, 6 Cush. 295, says: "To make an accident or casualty, or, as the law sometimes states it, *inevitable accident*, it

must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed."

See Ib. 296–298.

Nelson C. J., in *Harvey* vs. *Dunlop*, Hill and Denio Reports, Supplement 194, says: "All the cases concede that an injury arising from an *inevitable accident*, or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsiblity."

The foregoing propositions applied to the facts as found by the Court below, show that the defendants were not guilty of any negligence.

III.

Was it error to find against the plaintiff on the fourth count of the complaint?

Under this count it was sought to hold the defendants liable, independently of the question of negligence, because the injury was the result of the direct act of the ~~plaintiff's~~ defendants workman. It is urged that trespass *vi et armis* lies on a different principle from trespass on the case for negligence,

and that on the fourth count here it was only necessary to show that the injury resulted from the mallet and chisel in the hand of defendant's porter.

A great many of the cases already cited, and the views urged, apply to this branch of the case, and are again referred to.

We believe the principle clear, and the authorities direct, that even *in trespass vi et armis, it must appear that the intention was unlawful or the defendant in fault.*

One of the clearest and most conclusive cases on this subject is the case of *Brown* vs. *Kendall*, (6 Cushing, 295,) decided by that distinguished jurist, Chief Justice Shaw, who exhausts the learning on the subject. The action was trespass *vi et armis*, for an assault and battery. The defendant was trying to part two fighting dogs belonging to plaintiff and defendant, and in raising his stick over his shoulder to strike the dogs, hit the plaintiff in the eye, injuring it severely. It was held that the defendant was doing a lawful act, and that if, in so doing, and while using due care to avoid hurt to others, the injury to the plaintiff occurred, the defendant was not liable therefor; and that the burden of proof was on the plaintiff to establish the want of due care on the part of the defendant. The authorities cited by Chief Justice Shaw sustain this view fully, and his examination of the English cases supposed to be adverse, shows that they are not in conflict, but turn merely on the pleadings.

This case is cited and approved, and the same doctrines maintained, in *Rockwood* vs. *Wilson*, 11 Cushing, 226.

See also *Vincent* vs. *Stinehouse*, 7 Vermont R. 62.

Davis vs. *Saunders*, 2 Chitty R. 639.

Wakeman vs. *Robinson*, 1 Bing. 213.

1 Hilliard on Torts, 128–138; and cases cited.

Bullock vs. *Babcock*, 3 Wend. 391;

2 Greenl. on Ev., Sec. 85.

Powers vs. *Russell*, 13 Pick. 69–76.

Tourtellot vs. *Rosebrook*, 11 Metc. 460.

Shear & Red. on Neg. pp. 1 *et seq.*

The case of *Harvey* vs. *Dunlop* (Hill & Denio Reports, Supplement 193) was one in which the defendant threw a stone which put out the plaintiff's eye. It was held to be a question of negligence. The judgment went for defendant. The authorities cited by Judge Nelson fully sustain his decision.

The cases on this subject must be read with a view to the ancient system of pleading. The plea of not guilty, in trespass, only denied the act itself. Evidence to excuse or justify it was not admissible under the general issue, but was required to be specially pleaded.

Milman vs. *Dolwell*, 2 Camp. 378.

Knapp vs. *Saulsbury*, Id. 500.

Hall vs. *Fearnley*, 3 Ad. & El. 919. (43 Eng. C. L. R. 1037).

Brown vs. *Kendall*, 6 Cush. 295.

Dygert vs. *Bradley*, 8 Wend. 472.

In *Weaver* vs. *Ward*, (Hobart's R. 134) the special plea was held bad, because it did not "set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

Scott vs. *Shepherd*, 2 Wm. Black, R. 892; (S. C. 3 Wilson's Rep. 403, and 1 Smith's L. C. 468).

This is the famous *Squib case*. This was a case of clear wrong in the defendant. There was no question as to a *cause* of action, but the great question was the *form* of action. It was trespass *vi et armis*. It seems to have been supposed by some that *willfulness* was necessary to that *form* of action, but the majority of the Judges thought not, negligence by no means requiring willfulness. They thought that the intermediate persons throwing the squib acted in self defense, and from inevitable necessity. Now self defense is lawful against an attacking party, but does not justify an injury to a third person. There it must be shown, that there was no negligence. The real question, between the intermediate persons and the injured

party, would be one of due care in the act of self defense. Self defense, like any other lawful act, must be exercised with due care as to the rights of third persons. If the injury arose from the negligent act of the intermediate persons, no action of trespass could have been maintained against the defendant. But as they acted from self defense, which was lawful, and from inevitable necessity, and were guilty of no wrong, the action of trespass was held well brought against the party who originally threw the squib—he having committed an actual wrong.

In *Leame* vs. *Bray*, (3 East. 593) it was held that the defendants were liable for a direct act producing injury, even if faultless. That case is fully reviewed in *Brown* vs. *Kendall*, (6 Cush. 295). It has been doubted in England, in *Rogers* vs. *Imbleton*, (2 New. R. 117) and *Haggett* vs. *Montgomery*, (Id. 446). Judge Redfield severely comments upon it in *Claflin* vs. *Wilcox*, (18 Ver. R. 610 and 611) and says that in England it has been constantly falling into "oblivious disregard."

Castle vs. *Duryee*, (2 Keys [N. Y.] R. 172) was relied on by plaintiff's counsel. There a military company of which defendant was captain were exercising, and fired their muskets in a public place, supposing them to contain only blank cartridges; one unfortunately had a ball in, and injured the

plaintiff. The jury and all the Judges thought the defendant guilty of negligence, and that was the issue tried by the jury. Denio, C. J., thought defendant responsible even if there was no negligence, but the rest of the Judges decline to concur in that, evidently for the obvious reason that it was purely *obiter*, and doubtless because not sound law.

Hayes vs. *Cohoes Co.*, 3 Barb. 45, *et seq.*
S. C. 2 Ct., 160.
Tremain vs. *Cohoes*, Ib. 163.
Gordies vs. *Cormack*, 2 E. D. Smith, 201.

These cases were for injuries to adjoining property caused by blasting. In each case the injury was anticipated by the defendants—they knew they would injure the property of plaintiffs, yet they recklessly insisted on going on and doing it, and actually destroyed all comfortable use of the plaintiffs' property. They were plain cases of recklesss disregard of the plaintiffs' rights and property.

In these cases of blasting, the true issue was whether defendants were guilty of negligence.

Supra, and *Hardrop* vs. *Gallagher*, 2 E. D. Smth, 523.
Driscoll, admr., vs. *The Newark & Rosendale Lime, etc., Co.*, 37 N. Y. R. 637.

Even in the case of hauling gunpowder through

the streets, from which an injury resulted, it was held: "the question in such case is considering the risk to be run, were as many precautions taken by the defendant as would have been by a man of ordinary prudence, to prevent harm."

Furth vs. *Foster*, 7 Robertson (Sup. Ct.) R. 484.

In the Court, below the counsel for plaintiff also relied on *Fletcher* vs. *Ryland*, (1 Law Rep. Exch. Cases 1865-66, p. 265); *S. C. Ryland* vs. *Fletcher*, (3 Law Rep. Eng. and Irish Appeal Cases, 1868, p. 331.)

In these cases there was actual negligence in the employé of the defendant, and the findings were to that effect. There is something in the discourse of the judges to the effect that persons damming up water must take care, at their peril, that it does not break loose; and, if it does, they are liable. The contrary is laid down by the series of California and New York cases cited above in regard to water, and the question held to be whether there was, in the given case, due care and diligence.

The case of *Campbell* vs. *B. R. & A. W. & M. Co.*, 35 Cal. R. 683-4, (and the other cases affirmed by it) must be regarded as of controlling authority in California on that subject. This case holds that the defendant "could be required to exercise no greater care to avoid injury to the adjoining lands than prudent persons would employ about their

own affairs under similar circumstances. It was not bound to indemnify the plaintiff for all damage which could have been avoided by any possibility; but only for such damage as resulted from a want of ordinary care, which prudent persons exercise in the management of their property."

Any principle upon which the defendants in this action can be held liable for this accident—faultless, so far as they were concerned—would have applied to and made responsible the stevedore who discharged the cargo of the ship, the laborer on the dock who rolled the box on his truck to the drayman, the drayman himself, who hauled it to defendants' premises, and the porter who received it there, had the accident occurred whilst either of them, in the course of his duties, was handling the box. It is respectfully urged, that no man is in such peril of pecuniary liability who pursues his ordinary vocation in life, in the same prudent manner as his fellow men, and under circumstances which make him faultless under the strictest test of duty.

In the Supreme Courts of New York (1st Dept.) the questions involved in this case, and on the same facts, were decided in accordance with the views advanced in this brief. The action was by the defendants in error in this case vs. Burstenbinder, the shipper of the fatal case of nitro-glycerine. The case has been decided so recently that we are

unable to give at this time the proper citation, but hope to be able to do so before this cause is argued.

We beg leave also to refer to the very able and exhaustive opinion delivered in this case by the Hon. Lorenzo Sawyer, in the Court below.

December Term, 1872.

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